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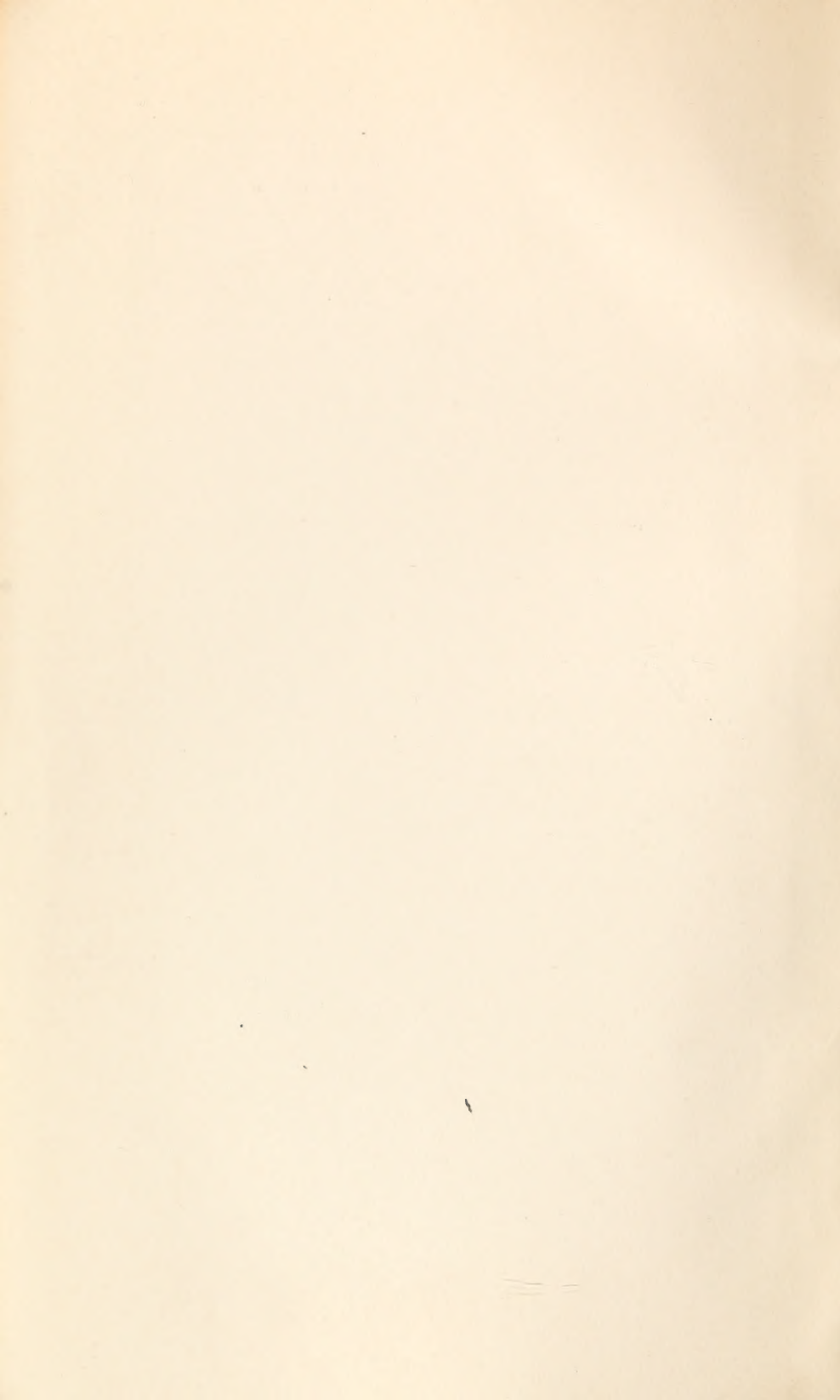
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No. 2015

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOLOMON RIPINSKY,

Appellant,

vs.

G. W. HINCHMAN, WILLIAM HOLGATE, JOHN G. MORRISON, J. A. NETTLES, CORTEZ FORD, TOM VALEUR, R. M. ODELL, D. BUTRICH, E. J. BERGER, IDA JOHNSON, M. E. HANDY, FRED HANDY, G. C. DE HAVEN, TIM CREEDON, BENJAMIN A. MAHAN, THOMAS DRYDEN, ED. FAY, JAMES FAY, H. FAY, W. W. WARNE, THOMAS VOGEL, C. BJORNSTAD, H. RAPPOLT, KAREN BJORNSTAD, M. V. McINTOSH, MARY V. McINTOSH, JESSE CRAIG, E. A. ADAMS, J. W. MARTIN, A. J. DENNERLINE, S. J. WEITZMAN, PETER JOHNSON, Mrs. KATE KABLER, and V. READE,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

FILED

OCT 25 1911

No. 2015

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOLOMON RIPINSKY,

Appellant,

vs.

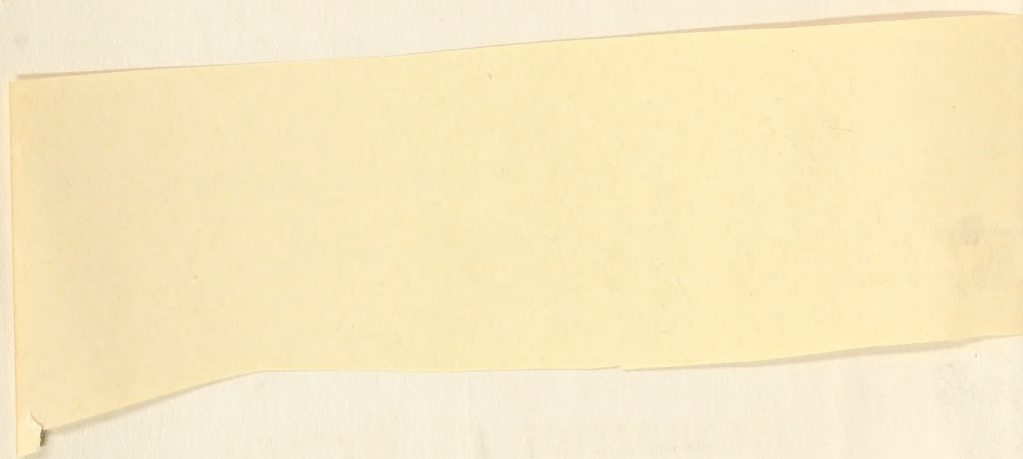
G. W. HINCHMAN, WILLIAM HOLGATE, JOHN G.
MORRISON, J. A. NETTLES, CORTEZ FORD,
TOM VALEUR, R. M. ODELL, D. BUTRICH, E.
J. BERGER, IDA JOHNSON, M. E. HANDY,
EDWARD HANDY, C. C. DE HAVEN, TIM

*Records of U. S. Circuit
Court of appeals
693*

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G. W. HINCHMAN, WILLIAM HOLGATE, JOHN G. MORRISON, J. A. NETTLES, CORTEZ FORD, TOM VALEUR, R. M. ODELL, D. BUTRICH, E. J. BERGER, IDA JOHNSON, M. E. HANDY, FRED HANDY, G. C. DE HAVEN, TIM CREEDON, BENJAMIN A. MAHAN, THOMAS DRYDEN, ED. FAY, JAMES FAY, H. FAY, W. W. WARNE, THOMAS VOGEL, C. BJORNSTAD, H. RAPPOLT, KAREN BJORNSTAD, M. V. McINTOSH, MARY V. McINTOSH, JESSE CRAIG, E. A. ADAMS, J. W. MARTIN, A. J. DENNERLINE, S. J. WEITZMAN, PETER JOHNSON, Mrs. KATE KABLER, and V. READE,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court for the District of Alaska, Division No. 1 at Juneau.

No. 547-A.

G. W. HINCHMAN, WILLIAM HOLGATE,
JOHN G. MORRISON, J. A. NETTLES,
CORTEZ FORD, TOM VALEUR, R. M.
ODELL, D. BUTRICH, E. J. BERGER,
IDA JOHNSON, M. E. HANDY, FRED
HANDY, G. C. DeHAVEN, TIM CREE-
DON, BENJAMIN A. MAHAN, THOMAS
DRYDEN, ED. FAY, JAMES FAY, H.
FAY, W. W. WARNE, THOMAS VOGEL,
C. BJORNSTAD, H. RAPPOLT, KAREN
BJORNSTAD, M. V. McINTOSH, MARY V.
McINTOSH, JESSE CRAIG, E. A. ADAMS,
J. W. MARTIN, A. J. DENNERLINE, S.
J. WEITZMAN, PETER JOHNSON, Mrs.
KATE KABLER and V. READE,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Third Amended Complaint.

Come now the plaintiffs above named and file this their Third Amended Complaint herein, and complain of the defendant and allege:

I.

That the plaintiffs above named, and each of them, are citizens of the United States and residents and occupants of property in the town of Haines, in the

District of Alaska, and residents of and in the occupancy of lands embraced in Survey No. 573, at Haines, Alaska, and that all of the land embraced in the said United States Survey No. 573, situated in the town of Haines, Alaska, is more particularly described as follows, to wit:

Beginning at Cor. No. 1, under Ripinsky's house, from which point U. S. L. M. No. — bears S. $6^{\circ} 45'$ W., 2.64 [1*] chains distant, witness Cor. bears W. 30 links, a stone marked S. 573 W. C. 1; thence from true Cor. N. $14^{\circ} 20'$ E., along mean high water mark of Portage Cove, 2.30 chains to Cor. No. 2, not set, witness Cor. bears W. 30 links, a stone marked S. 573 W. C. 2; thence from true Cor. W. 9.10 chs. to Cor. No. 3, an iron pipe 3 inches in diam. marked S. 573 C. 3; thence N. 3.16 chs. to Cor. No. 4, a granite stone marked S. 573 C. 4; thence W. 31.27 chs. to Cor. No. 5, a stone marked S. 573 C. 5; thence S. 1.68 chs. to Cor. No. 6, a stone marked S. 573, C. 6; thence S. $80^{\circ} 54'$ E. along north line of Presbyterian Mission, 34.00 chs. to Cor. No. 7, an iron pipe marked S. 573, C. 7; thence N. 1.67 chs. to Cor. No. 8, an iron pipe marked S. 573, C. 8; thence E. 6.23 chs. to Cor. No. 1, the place of beginning. Magnetic variation at all corners $28^{\circ} 30'$ east; containing 15.40 acres, is within the exterior boundaries of the town of Haines, in the District of Alaska.

II.

That all of said lands embraced in said Survey No. 573 have been ever since December, 1897, and now are, settled upon and occupied as a townsite and are

*Page number appearing at foot of page of original certified Record.

not subject to entry under agricultural pre-emption laws or otherwise than under the laws of the United States applicable to public lands settled upon and occupied as a townsite, and that the plaintiffs now are and have been ever since December, 1897, in possession and occupation in good faith of all the lands embraced in said Survey No. 573, hereinbefore described; that all of said lands embraced in said Survey No. 573 constitute the principal business section of the town of Haines, Alaska, and that the plaintiffs are occupying in good faith, and have at all times been occupying in good faith, said lands since the said month of December, 1897, for [2] business and residential purposes; and that these plaintiffs have constructed buildings, such as stores, hotels, residences, etc., in value exceeding the sum of \$50,000.00; annexed hereto and marked Exhibit "B" is a map of the portion of the townsite of Haines, Alaska, included within the exterior boundaries of the said United States Survey No. 573, and the plaintiffs herein claim that certain street 50 feet wide, and shown on said map and known as Main Street, and those certain streets shown on said map 75 feet wide and known as Second Avenue, Third Avenue, Fourth Avenue, Fifth Avenue and Sixth Avenue, respectively, and, also, that portion of Dalton Street as shown within the exterior boundaries of said Ripinsky Homestead Survey, as public streets and rights of way, and also claim that certain alleyway running between Dalton and Main Streets, and shown on said map and being 20 feet wide, as a public right of way or alley, which said streets and alleys are claimed

in common by all of the plaintiffs and by all of the residents of Haines, Alaska; that the remainder of the ground not so included within the streets and alleys, these plaintiffs claim to hold, together with the ground included within the streets and alleys, as occupants of townsite land prior to entry and as members of the community so occupying the said lands, together with the streets and alleys, in common, for the benefit of the said community and for the benefit of each and all of the said plaintiffs and occupants; and that the ground so set forth on said map and marked thereon by metes and bounds and by numbered parcels is in the occupancy of the plaintiffs herein respectively, as on the said map shown and indicated as follows, to wit:

Block 1: Parcel 1, J. G. Morrison; parcel 2, Nettles & Ford; parcel 3, S. J. Weitzman; parcel 4, H. Fay; parcel 5, Sol Ripinsky; [3] parcel 6, J. W. Martin; parcel 7, B. A. Mahan; parcel 8, M. V. McIntosh; parcel 9, J. W. Martin; parcel 10, James Fay; parcel 11, D. Butrich; parcel 12, R. L. Weitzman; parcel 13, R. L. Weitzman; parcel 14, E. A. Adams; parcel 15, Fred Handy; parcel 16, J. G. Morrison; parcel 17, G. C. Dehaven and Tim Creedon.

Block 2: Parcel 1, Thomas Vogel; parcel 2, T. D. Valeur; parcel 3, Jim Fay; parcel 4, Ida Johnson; parcel 5, S. J. Weitzman; parcel 6, M. E. Handy; parcel 7, W. W. Warne; parcel 8, W. W. Warne; parcel 9, W. W. Warne; parcel 10, W. W. Warne; parcel 11, W. W. Warne; parcel 12, Karen Bjornstad; parcel 13, Karen Bjornstad; parcel 14, Karen Bjornstad.

Block 3: Parcel 1, Mary V. McIntosh; parcel 2, Wm. Bryson; parcel 3, H. Fay; parcel 4, E. J. Berger; parcel 5, Karen Bjornstad; parcel 6, Henry Rappolt; parcel 7, Geo. Hinchman; parcel 8, Geo. Hinchman; parcel 9, C. Bjornstad; parcel 10, H. Conger; parcel 11, Wm. Holgate; parcel 12, Wm. Holgate.

Block 4: Parcel 1, Kate Kabler; parcel 3, H. Fay; parcel 4, Pete Johnson; parcel 5, Pete Johnson; parcel 6, Pete Johnson.

Block 5: Parcel 1, A. J. Dennerline; parcel 2, M. E. Handy; parcel 3, Ed. Fay; parcel 4, John Padlock; parcel 5, Thomas Dryden; parcel 6, Mrs. Jesse Craig.

Block 6: Parcel 1, Jo. Stubbler; parcel 2, A. J. Dennerline.

III.

That these plaintiffs have applied to the proper officers in the United States Land Office for a survey of said lands embraced within said Survey No. 573 for the purpose of entering the same as a townsite under the laws of the United States, in [4] such cases made and provided, including all of the lands embraced within the exterior boundaries of the town of Haines, Alaska, and that it is the intention of the plaintiffs and the occupants of the said town of Haines to apply for a United States patent to the lands embraced in said townsite and in said Survey No. 573.

IV.

That the defendant, Solomon Ripinsky, claims an interest and estate in and to the said lands embraced

within the said Survey No. 573 adverse to these plaintiffs.

V.

That the said defendant, Solomon Ripinsky, has never occupied any of the said lands within the said Survey No. 573 except two small parcels, one 25x50 feet, which he acquired by purchase from one H. Fay, and another 100x150 feet, which he occupies as a residence.

VI.

That on the 17th day of July, 1903, the said Solomon Ripinsky filed, or caused to be filed, a pretended location notice in the United States Commissioner's office at Skagway, in the District of Alaska, attempting to, and claiming to, locate all of the lands embraced within the exterior boundaries of the U. S. Survey No. 573 as a homestead; that at the time of filing said pretended location notice, all of the said lands embraced within the said location notice and within the said Survey No. 573 were occupied by the residents and citizens of the town of Haines, Alaska, and these plaintiffs have certain townsite holdings within the town of Haines, and that none of said lands were held by the said Solomon Ripinsky as a homestead, and in truth [5] and in fact, none of said lands were occupied by said Solomon Ripinsky save and except the two parcels herein described; that the location by the said Solomon Ripinsky of said lands was not in good faith, and that said Solomon Ripinsky well knew that the said lands were not subject to location for homestead purposes.

VII.

That on or about the 2d day of March, 1906, the said Solomon Ripinsky filed in the United States Land Office at Juneau, Alaska, his application for a patent to the lands embraced within said U. S. Survey No. 573; that thereafter a notice was issued and published by the Register and Receiver of the United States Land Office at Juneau, Alaska, of the application of the said defendant for the lands embraced in the said Survey No. 573; that within thirty days after the period of publication of said notice, the plaintiffs herein duly filed in the United States Land Office at *Junea*, Alaska, their notice of adverse claim, a copy of which is annexed hereto and marked Exhibit "A."

That it is the intention of these plaintiffs, inhabitants and occupants of the said townsite of Haines, as members of said community, to perfect their title to the said townsite lands by proceedings in the United States Land Office, under joint application of the members of said community for a United States survey of said townsite and the townsite entry, to be made by a trustee, under the laws of the United States applicable to Alaska in such cases, which said trustee shall apply for and make said entry for the use and benefit of these plaintiffs and all the members of said townsite and who shall obtain the said title for the common interest of all of the occupants of said townsite.

WHEREFORE, the plaintiffs pray that decree be entered herein adjudging and decreeing: [6]

1. That the said property included within the ex-

terior boundaries of Survey No. 573 is not subject to application for patent on the part of the defendant herein and is not, and was not, subject to location as a homestead.

2. That the plaintiffs herein be adjudged and decreed to be entitled to the lands embraced in the said U. S. Survey No. 573 as against the defendant, save and except the two parcels of land herein mentioned, which are in the actual occupation of the said defendant.

3. That the defendant be perpetually enjoined from proceeding with his said application for patent under the homestead laws and that the title of the plaintiffs herein and their right to the possession and occupation of the lands described in the said Survey No. 573, save and except the two parcels of land hereinbefore mentioned, be determined to be paramount to the claim of the defendant herein; and that any claim, interest or estate which the defendant may set forth to the said property be forever quieted in favor of these plaintiffs.

4. For plaintiffs' costs and disbursements herein laid out and expended, and for such other and further relief as to the Court may seem meet and proper.

SHACKLEFORD & BAYLESS,

Attorneys for Plaintiffs. [7]

Exhibit "A."

In the United States Land Office at Juneau, Alaska.

In the Matter of the Application for Patent for
Homestead Claim by SOLOMON RIPIN-
SKY.

G. W. HINCHMAN, WILLIAM HOLGATE,
JOHN G. MORRISON, JAMES A. NET-
TLES, CORTEZ FORD, TOM VALEUR,
R. M. ODELL, D. BUTRICH, E. J. BER-
GER, IDA JOHNSON, M. E. HANDY,
FRED HANDY, G. C. DEHAVEN, TIM
CREEDON, BENJAMIN A. MAHAN,
THOMAS DRYDEN, ED. FAY, JAMES
FAY, H. FAY, W. W. WARNE, TIM VO-
GEL, C. BJORNSTAD, H. RAPPOLT,
CAREN BJORNSTAD, M. V. McINTOSH,
JESSIE CRAIG, E. A. ADAMS, MARY V.
McINTOSH, J. W. MARTIN, A. J. DEN-
NERLINE, S. J. WEITZMAN, PETER
JOHNSON, MRS. KATE KABLER and V.
READ,

Adverse Claimants.

Adverse Claim.

To the Honorable Register and Receiver of the
United States Land Office at Juneau, Alaska:

Your adverse claimants, G. W. Hinchman, Will-
iam Holgate, John G. Morrison, James A. Nettles,
Cortez Ford, Tom Valeur, R. M. Odell, D. Butrich,
E. J. Berger, Ida Johnson, M. E. Handy, Fred
Handy, G. C. Dehaven, Tim Creedon, Benjamin A.

Mahan, Thomas Dryden, Ed. Fay, James Fay, H. Fay, W. W. Warne, Tim Vogel, C. Bjornstad, H. Rappolt, Caren Bjornstad, M. V. McIntosh, Jessie Craig, Mary V. McIntosh, E. A. Adams, J. W. Martin, A. J. Dennerline, S. J. Weitzman, Peter Johnson, Mrs. Kate Kabler and V. Read, to the application for patent for homestead claim for land embraced in Survey No. 573, at Haines, Alaska, respectfully show:

1. That all of your adverse claimants are citizens of the United States and residents of the town of Haines, Alaska. [8]

2. That all of the land embraced in said United States Survey No. 573 for which Solomon Ripinsky has applied to your office for patent as a homestead, and which land is more particularly described as follows, to wit:

Beginning at a cor. No. 1, under Ripinsky's house, from which point U. S. L. M. No. — bears S. $6^{\circ} 45'$ W. 2.64 chains distant, witness cor., bears W. 30 links, a stone marked S. S. 573 W. C. 1; thence from true cor. N. $14^{\circ} 20'$ E. along mean high water mark of Portage Cove, 2.30 chns. to cor. No. 2, not set, witness cor. bears W. 30 lks. a stone marked S. 573 W. C. 2; thence from true cor. west 9.10 chs. to cor. No. 3, an iron pipe 3 inches in diam. marked S $\frac{3}{4}$ 573 C. 3; thence N. 3.16 chs. to cor. No. 4, a granite stone marked S. 573 C. 4; thence W. 31.27 chs. to Cor. No. 5, a stone marked S. 573 C. 5; thence S. 1.68 chs. to cor. No. 6, a stone marked S. 573 C. 6; thence S. $80^{\circ} 54'$ E. along north line of Presbyterian Mission, 34.00 chs. to cor. No. 7, an iron pipe

marked S. 573 C. 7; thence N. 1.67 chs. to cor. No. 8, an iron pipe marked S. 573 C. 8; thence E. 6.23 chs. to cor. No. 1, the place of beginning. Magnetic variation at all corners $28^{\circ} 30'$ east; containing 15.4 acres, is within the exterior boundaries of the town of Haines, in the District of Alaska.

3. That all your adverse claimants are bona fide residents of said town of Haines, Alaska, and are now, and have been at all times since December, 1897, in possession and occupation, in good faith, of all the land embraced within said Survey No. 573 and hereinbefore described; that all of said land embraced in said survey, and hereinbefore described, constitutes the principal business section of the town of Haines, Alaska, and that your adverse claimants are occupying in good faith and have been at all times occupying said land in good faith since December, 1897, for business and residential purposes; that your adverse claimants have constructed buildings, such as hotel structures for business purposes, residences, etc., in value exceeding the sum of \$50,000.00.

4. That it is the intention of your adverse claimants to join all of the citizens of the town of Haines, Alaska, in an application to the United States Land Office for a United States patent for all of the land embraced within the exterior boundaries [9] of the town of Haines, including all of the premises embraced within said Survey 573 as a townsite under and by virtue of the laws of the United States applicable to the District of Alaska.

5. That the applicaton of said Solomon Ripinsky for a United States patent for said land embraced

within said survey 573 is not made in good faith, for the reason that said Solomon Ripinsky has never actually occupied any of said premises, except two small parcels, one 25x150 feet, in the southeasterly corner of said land and marked on applicant's plat Ripinsky house, which he acquired by purchase from one H. Fay, and the other 100x150 feet, in the extreme eastern end of said land embraced in said survey and marked in applicant's plat Garden, which he occupies as a residence; that said Solomon Ripinsky filed a pretended location notice in the United States Commissioner's office at Skagway, in the District of Alaska, on July 17, 1903, claiming all of the lands embraced in said survey 573 as a homestead and at the time of filing said pretended location said Solomon Ripinsky well knew that all of said premises, excepting the small parcels heretofore described as occupied by himself, were actually occupied in good faith and in the possession of all of your adverse claimants and that at the time of making said pretended location of said homestead claim said Solomon Ripinsky well knew that your adverse claimants had expended over forty thousand dollars in the construction of buildings and other improvements on said premises; that said Solomon Ripinsky is not in good faith in seeking United States patent for said premises for a homestead, but is endeavoring to procure patent to the same for speculative purposes. [10]

6. That prior to the filing of said pretended location notice by said Ripinsky, claiming said land as a homestead, your adverse claimants had expended a

sum of money exceeding \$40,000.00 in the improvement of said premises by building residences, store buildings and other structures on said premises and were at the time actually using and occupying said buildings as homes and store buildings; all of which was well known to the said Ripinsky at the time he filed for record in the United States Commissioner's office at Skagway, Alaska, his homestead notice claiming the land embraced in said homestead application, and that your adverse claimants have continued at all times since the initiation of their occupation in December, 1897, to occupy, improve and reside upon the premises described in said homestead application and said Survey 573; that the said Ripinsky was in the town of Haines, Alaska, during all of the time when said improvements were being made and said buildings erected by your adverse claimants and never notified or informed any of your adverse claimants in any manner that he laid any claim whatever to the premises on which they were making such improvements and never notified any of your adverse claimants that he intended to lay any claim whatever to any of the premises described in said homestead application and embraced within said survey 573, except the two small parcels thereof which have been hereinbefore referred to.

WHEREFORE, your adverse claimants pray that no further action be taken in your office upon said application of said Solomon Ripinsky for a United States patent as a homestead for the lands embraced within said survey 573 and described in said applica-

tion until the rights to said premises of your adverse claimants be determined in a court of competent jurisdiction [11] within the District of Alaska.

KATE A. KABLER.

S. J. WEITZMAN.

CORTEZ FORD.

JAMES A. NETTLES.

JOHN G. MORRISON.

IDA JOHNSON, by W. B. STOUT.

E. J. BERGER, by W. B. STOUT.

M. E. HANDY, by W. B. STOUT.

FRED HANDY, by W. B. STOUT.

B. A. MAHAN.

H. FAY.

ED. FAY.

J. W. MARTIN.

T. DRYDEN.

M. V. McINTOSH.

MARY V. McINTOSH.

JESSIE CRAIG.

JAS. FAY.

R. M. ODELL.

G. W. HINCHMAN.

G. C. DeHAVEN.

TIM CREEDON.

TOM VALEUR.

TIM VOGEL.

C. BJORNSTAD.

CAREN BJORNSTAD.

A. J. DENNERLINE.

E. A. ADAMS.

H. RAPPOLT.

W. W. WARNE, by C. FORD.

D. BUTTERICK.

WM. HOLGATE.

PETER JOHNSON, by S. J. WEITZMAN.

V. READ.

United States of America,

District of Alaska,—ss.

I, S. J. Weitzman, being first duly sworn, on oath depose and say: I am a citizen of the United States and a resident of Haines, Alaska; I am one of the adverse claimants in the above-entitled matter; I have read the above adverse claim, know the contents thereof and the same is true.

S. J. WEITZMAN.

Subscribed and sworn to before me this 1st day of May, 1906.

[Seal]

T. R. LYONS,

Notary Public for Alaska. [12]

H. Fay being first duly sworn on oath deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Amended Complaint, knows the contents thereof and that the same is true as he verily believes.

H. FAY.

Subscribed and sworn to before me this 17th day of May, 1911.

LEWIS P. SHACKLEFORD,

Notary Public in and for Alaska.

Service admitted May 13th, 1911.

J. H. COBB,

Atty. for Deft.



Surveyed Feb. 1907 by C. E. Davidson. Juneau Alaska

Scale 60 ft. - 1-inch





[Endorsed]: No. 547-A. In the _____ Court of the United States for the _____ of _____ G. W. Hinchman et al. vs. Solomon Ripinsky. Third Amended Complaint. Filed May 13, 1911. E. W. Pettit, Clerk. By _____, Deputy. Shackelford & Bayless, Attys. for Plffs. [13]

In the District Court for Alaska, Division No. 1, at Juneau.

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Demurrer.

Now comes the defendant by his attorneys and demurs to the third amended complaint of the plaintiffs herein and for grounds of demurrers allege:

1st. The cause of action now attempted to be plead by the plaintiffs is barred by the statute of limitation in such cases made and provided for the following reasons to wit: The original complaint herein filed on July 2d, 1906, and which purported to be an adverse suit under the statute was abandoned as to the cause of action arising in the adverse proceedings by the plaintiffs by the filing of the second amended complaint herein which is simply the ordinary suit to quiet title, and it is now too late to revive the same by an amended as an adverse suit under the statute.

2d. There is a misjoinder of parties, plaintiffs and of cause of action in this, that the plaintiffs are claiming severally *a* and separately designated portions of survey No. 573 the ground in controversy and cannot unite in one action suit to quiet title to the several portions so separately claimed by the plaintiffs, nor can the plaintiffs unite in the same action and suit to quiet title to land in their possession individually with a suit to protect claimed rights in public thoroughfares.

3d. The said third amended complaint does not state facts sufficient to constitute a cause or causes of action in that it appears therefrom that the plaintiffs have no title to any [14] of the ground in controversy, but merely alleges an intention to acquire title in the future, all of which the defendant prays judgment of the court.

R. W. JENNINGS and
J. H. COBB,

Attorneys for Defendant.

[Endorsed]: Original No. 547-A. In the District Court for Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plaintiffs, vs. Solomon Ripinsky, Defendant. Demurrer to 3d Amended Complaint. Filed May 15, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. R. W. Jennings, J. H. Cobb, Attorneys for Defendant. Office: Juneau, Alaska.
[15]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOL RIPINSKY,

Defendant.

Order Overruling Demurrer of Defendant.

This cause coming on regularly for hearing upon the demurrer of defendant to the third amended complaint herein, the plaintiffs being represented by L. P. Shackelford, Esquire, and the defendant being represented by J. H. Cobb, Esquire, and after argument by respective counsel and the Court being fully advised in the premises, it is ordered that said demurrer be and the same is overruled, to which defendant excepts and exception is allowed.

And it is further ordered that defendant file his answer this afternoon.

EDWARD E. CUSHMAN,

Judge.

Juneau, Alaska, May 15, 1911. [16]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 547-A.

GEORGE HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKI,

Defendant.

Answer to Third Amended Complaint.

Now comes the defendant by his attorneys, and for answer to the Third Amended Complaint denies and alleges as follows:

I.

Referring to the first paragraph of said answer, defendant has no knowledge or information sufficient to enable him to form a belief as to whether the plaintiffs are all citizens of the United States and he therefore denies the same.

He further denies that said survey No. 573 is within the town of Haines or any town, but he admits it is within what is claimed to be the town of Haines.

II.

Referring to the second paragraph of said amended complaint, defendant denies all and singular the allegations therein contained except as in the affirmative answer set forth.

III.

Referring to the third paragraph of said amended complaint, defendant has no knowledge or information sufficient to enable him to form a belief concern-

ing the matters therein alleged, and he therefore denies all and singular the allegations therein contained.

IV.

Referring to the fifth paragraph of said amended complaint, defendant denies all and singular the allegations therein contained.

V.

Referring to the sixth paragraph of said second amended complaint defendant denies all and singular the allegations therein contained [17] except as in the affirmative answer expressly set forth.

VI.

Referring to the seventh paragraph of said amended complaint defendant admits the allegations therein contained in the first subdivision thereof relating to the proceedings in the land office; but he denies all and singular the other and remaining allegations in said paragraph contained.

And for a further and affirmative defence and by way of cross-complaint, defendant alleges:

I.

That defendant is a citizen of the United States.

II.

That the lands embraced within the exterior boundaries of United States Survey No. 573, mentioned and described in the said complaint, were on and long prior to the 17th day of May, 1884, in the actual occupancy of and claimed by natives of Alaska to wit: Sarah Dickinson and her family, and said lands were by the act of Congress of said date reserved to the use of such occupants and claimants,

and their grantees and successors until Congress should provide the means whereby such claimants or their successors should obtain the title.

III.

That said Sarah Dickinson continued in the use, occupancy and claim to said premises, until on or about the 2d day of December, 1897, when she and her family for a valuable consideration sold and conveyed the same to this defendant and placed him in the quiet and undisturbed and actual possession thereof, and he has ever since resided thereon and claimed the whole thereof as his home.

IV.

That on or about December 14th, 1897, the plaintiff H. Fay accompanied by a number of men acting with him came to said premises, and by superior force and against the will and protest of the defendant dispossessed and ejected him from all that portion of said [18] premises except a small piece of ground at the extreme easterly end thereof, where his house actually stood, and that portion described as lot or parcel 5 in Block 1, and thereafter illegally and wrongfully pretended to lay the same out into a townsite, and pretended to have the same surveyed into lots, blocks, streets and alleys. That said acts were illegal and void, for the reason that said land was not open to settlement or entry under the townsite laws. That thereafter a number of the other plaintiffs pretended to set up claims of various sorts to separate portions of said premises same by pretended locations for trade and manufacturing purposes, some as town lots, some as naked occupants,

the precise nature and extent of the several claims of the plaintiffs is to the defendant unknown, buth they are each and all subsequent in time inferior to, and void against the title and claim of the defendant.

V.

Defendant further alleges that on or about June 23d, 1903, he posted and filed for record his notice of location of a homestead, embracing the lands in controversy; that thereafter said notice was amended on or about Dec. 18, 1905; and defendant procured said claim to be surveyed by C. E. Davidson, U. S. Deputy Surveyor on March 23d—26th, 1905 and thereafter on July 31st, 1905, said survey was duly approved by the Surveyor General for Alaska as U. S. survey No. 573, homestead claim of defendant; and thereafter he duly filed in the United States Land Office at Juneau, Alaska, his application to enter said land, gave the notice required by law and made proof of occupancy and improvements required by law, and of his right to enter the same as a homestead and thereby became and now is entitled to a *patnet* from the Government for the lands embraced in said survey; and said patent would have been issued but for the wrongful acts of the plaintiffs in filing said pretended adverse claim and instituting this suit whereby the proceedings in the Land Department were wrongfully suspended. [19]

WHEREFORE defendant prays that the plaintiffs take nothing by this suit, that their bill be dismisses, that defendant be adjudged to be the owner and entitled to a patent for the said land, for costs of suit

and general relief.

R. W. JENNINGS and
J. H. COBB,
Attorneys for Defendant.

United States of America,
District of Alaska,—ss.

Solomon Ripinski being first duly sworn on oath deposes and says: I am the defendant above named, I have read the above and foregoing answer, know the contents thereof, and the same is true as I verily believe.

SOLOMON RIPINSKI.

Subscribed and sworn to before me this the 15th day of May, 1911.

[Seal]

J. H. COBB,

Notary Public in and for Alaska.

Service of the within Answer is admitted to have been made by delivery of a copy thereof, this 15 day of May, 1909.

W. S. BAYLESS,
Of Attorneys for Plaintiff.

[Endorsed]: Original No. 547-A. In the District Court for Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plaintiffs, vs. Solomon Ripinski, Defendant. Answer to 3d Amended Complaint. Filed May 15, 1911. E. W. Pettit, Clerk. By ———, Deputy. R. W. Jennings, and J. H. Cobb, Attorneys for Deft. Office: Juneau, Alaska.
[20]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 547-A.

GEORGE W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Findings of Fact.

On this day, this cause coming on to be heard on the testimony heretofore taken by the Referee in this cause, the opinion and decision of the Court heretofore rendered herein on the 10th day of July, 1908, the decision of the Court of Appeals on appeal therefrom and the amendment of said latter decision by said Court of Appeals, upon the petition for rehearing filed March 9, 1911 in said court, upon the decree and mandate of that court, the pleadings of the parties as thereafter amended and the further evidence taken in the above-entitled court, and the court being now fully advised in the premises makes and enters herein its Findings of Fact as follows, to wit:

1.

That all of the parties herein named except D. Butrich, E. J. Berger, Thomas Dryden, Peter Johnson, V. Reade and H. Rappolt are citizens of the United States and all the plaintiffs were at the time of the commencement of this action and have been for a long time prior thereto residents of the town of Haines and were at said time and for a long time

prior thereto in possession [21] and occupation of substantially all of that portion of Survey No. 573 at Haines, Alaska, included in Blocks 1, 2, 3, 4, 5 and 6 of the town of Haines as surveyed and platted by Walter Fogelstrom and were at all such times in possession of and using as streets and alleys the streets and alleys platted therein by him, except Lot 5 of Block 1 of said plat, which said survey No. 573 is more particularly described as follows:

Beginning at Cor. No. 1, under Ripinsky's house, from which point U. S. L. M. No. — bears S. 6° 45' W. 2.64 chains distant, witness Cor. bears W. 30 links, a stone marked S. 573 W. C. 1; thence from true Cor. N. 14° 20' E., along mean high-water mark of Portage Cove, 2.30 chains to cor. No. 2, not set, witness Cor. bears W. 30 links, a stone marked S. 573 W. C. 2; thence from true Cor. W. 9.10 chains to Cor. No. 3, an iron pipe 3 inches in dia. marked S. 573 C. 3; thence N. 3.16 chains to Cor. No. 4, a granite stone marked S. 573, C. 4; thence W. 31.27 chs. to Cor. No. 5, a stone marked S. 573 C. 5; thence S. 168 chs. to Cor. No. 6, a stone marked S. 573 C. 6; thence S. 80° 54' along north line of Presbyterian Mission 34.00 chs. to Cor. No. 7 an iron pipe marked S. 573 C. 7; thence N. 1.67 chs. to cor. No. 8, an iron pipe marked S. 573, C. 8; thence E. 6.23 chs. to Cor. No. 1 the place of beginning. Magnetic variation at all corners 28° 30' east; containing 15.40 acres, is within the exterior boundaries of the town of Haines, in the District of Alaska.

That neither the plaintiffs, nor anyone in their behalf has ever made an entry of said lands or any part

thereof for townsite purposes.

2.

That the defendant acquired no right, title or interest in or to any of the premises within said Survey No. 573 described in paragraph 1 of these Findings by virtue of the alleged deed, dated December 2, 1897, and signed S. Dickinson; and that the defendant acquired no right, title, interest, possession or right of possession in or to any of the lands included in said survey described in paragraph 1 of these Findings by virtue of the homestead location notice which he filed at the recording office at Skagway, Alaska, on the 23d day of June, 1903, and the defendant acquired no right, title, interest, possession or right [22] of possession in or to said premises by virtue of the amended location which he filed in the recording office at Skagway, Alaska, on the 18th day of December, 1905, and that the said defendant never has had any right, title or interest in or to any of said premises or survey except two small parcels hereinafter described, one of *which obtained* by purchase and the other by actual occupation.

3.

That substantially all of the lands embraced within that portion of Survey No. 573 platted by said surveyor, Walter Fogelstorm, as the town of Haines and described in paragraph 1 of these Findings, except said lot 5 Block 1, were at the commencement of this action and have been ever since and prior to June 23, 1903, in the actual, notorious and exclusive possession and occupation in good faith of the plaintiffs herein, their grantors and predecessors in in-

terest, which said lands constitute the principal business section of the town of Haines, Alaska; and that the plaintiffs were at the time of the commencement of this action and have been at all times since the 23d day of June, 1903, occupying said lands in good faith for business and residential purposes; that these plaintiffs and their grantors and predecessors in interest have constructed buildings, such as stores, hotels and residences, on said platted portion of said land, in value exceeding the sum of \$50,000; that the larger portion of said land embraced in said platted portion of said Survey No. 573 has been since June 23, 1903 and prior thereto occupied by the plaintiffs, their grantors and predecessors in interest, in severalty and that the remaining portions, except said Lot 5, Block 1, were occupied and used by the plaintiffs, their grantors and predecessors in interest, at the time of [23] the commencement of this action and at all times since the 23d day of June, 1903, and prior thereto, as streets, alleys and thoroughfares.

4.

That the defendant has no right, title or interest in or to any of said lands included within Survey 573 at the time of the commencement of this action and never had any right, title, interest or possession in or to said lands, except two small tracts, one 20 feet wide by 50 feet long, known and described as Lot 5, Block 1 in said town of Haines and another small tract of land 100 feet wide by 150 feet long, which last parcel of land said defendant occupies as a residence, and which is in the extreme easterly end of said Survey 573 and is used by said defendant as a

residence, store and garden, and said *land* mentioned tract of land of said defendant is east of said Block 1 in the town of Haines, Alaska; that said two tracts of land described are included within the lines embraced in said Survey 573 and were owned and occupied by the defendant at the time of the commencement of this action, but said two tracts of land are the only portions of said land embraced in Survey No. 573 which were owned and occupied by the defendant at the time of the commencement of this action, or were ever owned, possessed or occupied by said defendant.

5.

That on or about the 2d day of March, 1906, the defendant Solomon Ripinsky, filed in the United States Land Office at Juneau, Alaska, his application for a patent to the lands embraced within said U. S. Survey 573; that thereafter a notice was issued and published with the Register and Receiver of the United States Land Office at Juneau, Alaska, of the application of the said defendant for the lands embraced in the said Survey No. 573; [24] that within thirty days after the period of publication of said notice the plaintiffs above named duly filed in the U. S. Land Office at Juneau, Alaska, their notice of adverse claim, and that this suit was duly begun under and in support of said adverse claim.

To all of which the defendant excepts and the exception is allowed. Done in open Court this 29th day of May, 1911.

EDWARD E. CUSHMAN,

Judge. [25]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 547-A.

GEORGE W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Conclusions of Law.

The Court having heretofore made and entered its Findings of Fact herein, now makes and enters its Conclusions of Law based upon such findings of fact:

1.

That the mere occupation of the lands described in the Findings of Fact by the plaintiffs, their grantors and predecessors in interest, without entry of said lands or any portion thereof for townsite purposes, does not constitute sufficient title or right upon which to entitle them to maintain this suit to quiet title or remove any cloud thereon, by reason of the defendant's assertion and claim thereto or otherwise.

2.

That the defendant is the owner and entitled to have his title thereto quieted against the plaintiffs to those two small tracts of land described in paragraph 4 of the foregoing findings.

3.

That the defendant is entitled to judgment for costs.

Decree will be entered in accordance with the fore-

going Findings of Fact and Conclusions of Law.

Done in open Court this 29th day of May, 1911.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: No. 547-A. In the District Court of the United States for the District of Alaska, Div. No. 1. G. W. Hinchman et al. vs. Sol Ripinsky. Findings of Fact and Conclusions of Law. Filed May 29, 1911. E. W. Pettit, Clerk. By _____, Deputy. [26]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 547-A.

GEORGE W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Decree.

This cause having come on regularly to be heard before the Court and the Court having heretofore made and filed the finding of fact and conclusions of law herein.

IT IS CONSIDERED by the Court, and so ordered, adjudged and decreed that the plaintiffs take nothing by their bill of complaint herein and the same is hereby dismissed on the merits.

IT IS FURTHER CONSIDERED by the Court and so ordered, adjudged and decreed that the defendant, Solomon Ripinsky, is the owner of the following described parcels of land in Survey No. 573,

bounded as follows:

A tract or parcel on the extreme east end of said Survey No. 573, 100x150 feet in area, and parcel No. 5 in Block No. 1, according to the plat made by Walter Fogelstrom, as shown on Exhibit No. 1 attached to the Third Amended Complaint herein, which parcels are disclaimed by plaintiffs, and that he has no interest or right in the remainder of said lands, included in said Survey No. 573.

IT IS FURTHER ORDERED, adjudged and decreed that the defendant, Solomon Ripinsky, do have and recover of and from the above-named plaintiffs, G. W. Hinchman, William Holgate, John G. Morrison, J. A. Nettles, Cortez Ford, Tom Valeur, R. M. Odell, D. Butrich, E. J. Berger, Ida Johnson, M. E. Handy, Fred Handy, G. C. [27] De Haven, Tim Creedon, Benjamin A. Mahan, Thomas Dryden, Ed. Fay, James Fay, H. Fay, W. W. Warne, Thomas Vogel, C. Bjornstad, H. Rappolt, Karen Bjornstad, M. V. McIntosh, Mary V. McIntosh, Jesse Craig, E. A. Adams, J. W. Martin, A. J. Dennerline, S. J. Weitzman, Peter Johnson, Mrs. Kate Klaber and V. Reade, and each of them, jointly and severally, the costs and disbursements in this case laid out and incurred, taxed at the sum of \$ ——. For which let execution issue.

Dated this 29th day of May, 1911.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: In the District Court of the United States for the Div. No. 1 of Alaska. Hinchman et al.

vs. Sol. Ripinsky. Filed May 29, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. [28]

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Petition for Allowance of Appeal.

Solomon Ripinsky, defendant in the above-entitled and numbered cause, feeling himself aggrieved by the judgment and decree rendered against him in said cause, on the 29th day of May, 1911, prays the Court to allow him an appeal from the said decree to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit and to fix in the order allowing said appeal the security he should be required to give for costs.

J. H. COBB,

Attorney for S. Ripinsky.

[Endorsed]: No. 547-A. In the District Court for Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plffs., vs. Solomon Ripinski, Deft. Petition for Allowance of Appeal. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By ———, Deputy. J. H. Cobb, Atty. for Deft. [29]

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Order Allowing Appeal.

This cause came on to be heard upon the petition of S. Ripinsky for the allowance of an appeal from the decree rendered herein on the 29th day of May, 1911, and the Court having heard said petition, and the assignments of error having been filed herewith, it is ordered that said appeal be, and the same is hereby allowed, and the said S. Ripinsky shall give a cost bond on the appeal for the sum of Two Hundred and Fifty (\$250.00) Dollars.

Dated this 3d day of June, 1911.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: No. 547-A. In the District Court for Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plffs., vs. Solomon Ripinski, Deft. Order Allowing Appeal. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By ———, Deputy. J. H. Cobb, Atty. for Deft. [30]

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Assignment of Errors.

Now comes the defendant Solomon Ripinsky by his attorneys and assigns the following errors committed by the Court on the trial and in the rendition of the decree in the above-entitled and numbered cause, and upon which he will rely in the Appellate Court, to wit:

First.

The Court erred in overruling the demurrer of the defendant to the plaintiffs' third amended complaint.

Second.

The Court erred in ruling and holding that the findings made by the District Court for Alaska on the former trial of this cause, against the defendant's title was the law, of the case, and precluded the Court from again examining into and passing upon the sufficiency of the evidence as to the defendant's title, and right to homestead entry.

Third.

The Court erred in refusing the prayer of the defendant to make the following finding of fact:

The land in controversy in this suit was on the 14th day of December, 1897, in the actual possession and occupancy of the defendant, Solomon Ripinsky, under a deed and claim of ownership hereinafter set

out. And afterwards on the said date the plaintiff, H. Fay and a number of other persons, none of whom are parties to this suit, or now claim any of the property in controversy, entered upon said property and forcibly and against the protests of the defendant ousted [31] him therefrom and said parties thereafter laid out a townsite, or attempted to, embracing the land in controversy, and had one Fogelstrom to make a plat of the same into lots, blocks, and streets. Some of the said premises was located as town lots, some as trade and manufacturing sites, some as homesteads and a part was not located at all. Other persons followed and locations have been made by the plaintiffs from that date promiscuously up till after the institution of this suit, but all such locations and occupancies as were made and asserted by the plaintiffs were against the protest and rights of the defendants.

Fourth.

The Court erred in refusing the prayer of the defendant to make the following finding of fact:

The ground in controversy was surveyed for one George Dickinson by an officer of the U. S. "James-town" in the year 1871. Dickinson at that time was acting for a concern known as the Northwest Trading Company and the tract so surveyed was at that time fenced and the corner posts set and buildings were constructed thereon and a postion cleared and cultivated. In the year 1880 George Dickinson succeeded to interests of the Northwest Trading Co., and from that year to the year 1888 when he died, Dickinson and his family continued to occupy said premises,

residing thereon and cultivating a portion thereof, and the said Dickinson and his family were in the occupancy, possession and claim of said premises on the 17th day of May, 1884.

Fifth.

The Court erred in refusing the prayer of the defendant to make the following finding of fact:

In 1888 George Dickinson died and left surviving him his wife, Sarah Dickinson, his son William Dickinson. Mistress [32] Sarah Dickinson, was a native Alaska woman. The Dickinson family continued in the possession and claim of said premises until the 2d day of December, 1897, upon which date she sold and conveyed said premises to the defendant, Solomon Ripinsky and placed him in possession thereof and on the 21st day of December, William Dickinson also sold whatever interest he had in said premises to the defendant, said Ripinsky.

Sixth.

The Court erred in refusing the prayer of the defendant to make the following finding of fact:

On the 14th day of December, 1897, the plaintiff Harry Fay accompanied by some five or six other men, because of the report that a railroad was to be built from that point, went from the village of Chilcat, Alaska, about a mile distant from the property in controversy in this suit and against the protest and with a disregard of the rights and possession of the defendant entered upon said premises and made locations thereon of town lots, locations for trade, and manufacturing sites, etc., and thereafter had one

Fogelstrom lay out some six blocks of ground embracing the property in controversy, into blocks and lots, substantially as shown upon the plat attached to the third amended complaint.

Seventh.

The Court erred in refusing the prayer of the defendant to make the following finding of fact:

On June 23d, 1903, the defendant, Solomon Ripinsky, posted and filed a notice of location of his homestead embracing all the land in controversy and also the buildings and improvements then and now occupied by him and purchased from the Dickinsons. Thereafter on March 23-26, 1905, the defendant had Survey No. 573 made by U. S. Deputy Surveyor. C. E. Davidson, as his homestead claim, which survey was officially [33] approved on July 31, 1905, by the Surveyor General for Alaska. This survey embraced all the land in controversy. After the survey was made the defendant's notice of homestead location was amended to conform to the official field notes.

Eighth.

The Court erred in refusing the prayer of the defendant to make the following finding of fact:

Thereafter the defendant duly and regularly applied for patent for the said premises as his homestead, and published his notice as required by law, when the plaintiffs filed the adverse claim a copy of which is attached to the third amended complaint and instituted this suit.

Ninth.

The Court erred in refusing the prayer of the de-

fendant to make the following finding of fact:

Plaintiffs have failed to prove that any of them are citizens of the U. S. except the three Fays.

Tenth.

The Court erred in refusing the prayer of the defendant to make the following finding of fact:

The plaintiffs have failed to show any interest, jointly, severally or otherwise in any of the streets, avenues or alleys mentioned in the complaint.

Eleventh.

The Court erred in refusing the prayer of the defendant to make the following finding of fact:

The defendant, Solomon Ripinsky, is a citizen of the U. S. qualified to enter lands as a homestead and has fully complied with the law, entitling him to enter the premises in controversy.

Twelfth.

The Court erred in refusing the prayee of the defendant to make the following conclusions of law:
[34]

That the defendant's grantors were protected in their possession and claim to said premises by the 8th section of the act of May 17, 1884, and they conveyed a good title to the defendant which he was entitled to enter as his homestead under the act of Congress extending the homestead laws to Alaska.

Thirteenth.

The Court erred in refusing the prayer of the defendant to make the following conclusions of law:

The defendant is entitled to a judgment on his cross-complaint for the ground in controversy and for his costs.

Fourteenth.

The Court erred in that portion of finding No. 1 which reads as follows:

That all of the parties herein named except D. Butrich, E. J. Berger, Thomas Dryden, Peter Johnson, V. Reade and H. Rappolt are citizens of the United States and were at the time of the commencement of this action and had been for a long time prior thereto residents of the town of Haines and were at said time and for a long time prior thereto in possession and occupation of substantially all of that portion of Survey No. 573 at Haines, Alaska, included in Blocks 1, 2, 3, 4, 5 and 6 of the town of Haines as surveyed and platted by Walter Fogelstorm and were at all such times in possession of and using as streets and alleys the streets and alleys platted therein by him, except Lot 5 of Block 1 of said plat.

Fifteenth.

The Court erred in making finding number two which reads as follows:

That the defendant acquired no right, title or interest in or to any of the premises within said Survey No. 573 described in paragraph 1 of these Findings by virtue of the [35] alleged deed, dated December 2, 1897, and signed by S. Dickinson; and that the defendant acquired no right, title, interest, possession or right of possession in or to any of the lands included in said survey described in paragraph 1 of these Findings by virtue of the homestead location notice which he filed at the recording office at Skagway, Alaska, on the 23d day of June, 1903, and

the defendant acquired no right, title, interest, possession or right of possession in or to said premises by virtue of the amended location which he filed in the recording office at Skagway, Alaska, on the 18th day of December, 1905, and that the said defendant never has had any right, title or interest in or to any of said premises or survey except two small parcels hereinafter described, one of which he obtained by purchase and the other by actual occupation;

Sixteenth.

The Court erred in making finding number three which reads as follows:

That substantially all of the lands embraced within that portion of Survey No. 573 platted by said surveyor, Walter Fogelstorm, as the town of Haines and described in paragraph 1 of these Findings, except said Lot 5, Block 1, were at the commencement of this action and have been ever since and prior to June 23, 1903, in the actual, notorious and exclusive possession and occupation in good faith of the plaintiffs herein, their grantors and predecessors in interest, which said lands constitute the principal business section of the town of Haines, Alaska; and that the plaintiffs were at the time of the commencement of this action and have been at all times since the 23d day of June, 1903, occupying said lands in good faith for business and residential purposes; that these plaintiffs and their grantors and predecessors in interest have constructed buildings, such [36] as stores, hotels and residences, on said platted portion of said land, in value exceeding the sum of \$50,000; that the larger portion of said land em-

braced in said platted portion of said Survey No. 573 has been since June 23, 1903, and prior thereto occupied by the plaintiffs, their grantors and predecessors in interest, in severalty and that the remaining portions, *except* said Lot 5, Block 1, were occupied and used by the plaintiffs, their grantors and predecessors in interest, at the time of the commencement of this action and at all times since the 23d day of June, 1903, and prior thereto, as streets, alleys and thoroughfares.

Seventeenth.

The Court erred in making finding number four which reads as follows:

That the defendant has no right, title or interest in or to any of said lands included within Survey 573 at the time of the commencement of this action and never had any right, title, interest or possession in or to said lands, except two small tracts, one 20 feet wide by 50 feet long, known and described as Lot 5, Block 1 in said town of Haines and another small tract of land 100 feet wide by 150 feet long, which last parcel of land said defendant occupies as a residence and which is in the extreme easterly end of said survey 573 and is used by said defendant as a residence, store and garden, and said *land* mentioned tract of land of said defendant is east of said Block 1 in the town of Haines, Alaska; that said two tracts of land described are included within the lines embraced in said Survey 573 and were owned and occupied by the defendant at the time of the commencement of this action, but said two tracts of land are the only portions of said land embraced in Survey

No. 573 [37] which were owned and occupied by the defendant at the time of the commencement of this action, or were ever owned, possessed or occupied by said derendant.

Eighteenth.

The Court erred in entering the decree made herein, *ajudging* and decreeing that the defendant Solomon Ripinsky has no interest or right in any of the lands included in survey No. 573, excepting two small parcels thereof, and in refusing to enter in a decree for the defendant decreeing him to be the owner and entitled to the possession of all of said survey No. 573 and to enter the same as his homestead for the reason that under the undisputed proofs and evidences offered no other decree is, or could be sustained by such proofs.

And for the said errors and other manifest of records herein the defendant prays that the decree of the district court for Alaska be reversed and the cause remanded with instructions to the lower court to enter *an* decree in conformity with the prayer of the defendant's cross-complaint and for such other and further orders as to the court may seem proper. And for this he will ever pray, etc.

J. H. COBB,

Attorney for Defendant and Appellant.

[Endorsed]: No. 547-A. In the District Court for Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plffs., vs. Solomon Ripinski, Deft. Assignment of Errors. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By _____, Deputy. J. H. Cobb, Atty. for Defts. [38]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS THAT we, Solomon Ripinsky, as principal, and R. P. Nelson and Henry Brie as sureties, are held and firmly bound unto G. W. Hinchman, William Holgate, John G. Morrison, J. A. Nettles, Cortez Ford, Tem Valeur, R. M. Odell, D. Butrich, E. J. Berger, Ida Johnson, M. E. Handy, Fred Handy, G. C. De Haven, Tim Creedon, Benjamin A. Mahan, Thomas Dryden, Ed. Fay, James Fay, H. Fay, W. W. Warne, Thomas Vogel, C. Bjornstad, R. Rappolt, Karen Bjornstad, M. V. McIntosh, Mary V. McIntosh, Jesse Craig, E. A. Adams, J. W. Martin, A. J. Dennerline, S. J. Weitzman, Peter Johnson, Mrs. Kate Kabler, and V. Reade, in the full and just sum of Two Hundred and fifty (250.00) Dollars to be paid to the said plaintiffs, their attorneys, executors, administrators or assigns to which payment, well and truly to be made, We bind ourselves, our heirs, executors and assigns jointly and severally firmly by these presents.

Sealed with out seals and dated this 2d day of June,

the Year of Our Lord One Thousand Nine Hundred and Eleven.

WHEREAS lately at a session of the District Court for Alaska, Division No. 1 in a suit pending in said Court between the above-named plaintiffs and Solomon Ripinsky the above-named defendant a decree was rendered against the said Solomon Ripinsky, and the said Solomon Ripinsky having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the aforesaid suit rendered on the 29th day of May, 1911, and a citation directed to the above-named [39] plaintiffs and appellees is about to be issued, citing and admonishing them to be and appear at the U. S. Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California.

Now the condition of the above obligation is such that if the above Solomon Ripinsky shall prosecute his said appeal to effect and shall answer all costs that may be awarded against him, if he fail to make good his plea, then the above obligation is to be void; otherwise to remain in full force and virtue.

S. RIPINSKY,

By J. H. COBB,

His Atty. of Record.

R. P. NELSON,

HENRY BRIE.

Sufficiency of assurities on the foregoing bond approved this 3d day of June, 1911.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Original. No. 547-A. In the District Court for Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plaintiffs, vs. Solomon Ripinsky, Defendant. Bond on Appeal. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By ———, Deputy. J. H. Cobb, Attorneys for Deft. Office: Juneau, Alaska. [40]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Citation.

United States of America,—ss.

The President of the United States to G. W. Hinchman, William Holgate, John G. Morrison, J. A. Nettles, Cortez Ford, Tom Valeur, R. M. Odell, D. Butrich, E. J. Berger, Ida Johnson, M. E. Handy, Fred Handy, G. C. De Haven, Tim Creedon, Benjamin A. Mahan, Thomas Dryden, Ed. Fay, James Fay, H. Fay, W. W. Warne, Thomas Vogel, C. Bjornstad, H. Rappolt, Karen Bjornstad, M. V. McIntosh, Mary V. McIntosh, Jesse Craig, E. A. Adams, J. W. Martin, A. J. Dennerline, S. J. Weitzman, Peter Johnson, Mrs. Kate Kabler, and V. Reade, Greeting:

You are hereby cited and admonished to be and

appear at a U. S. Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the state of California, within thirty days from the date hereof pursuant to an order allowing an appeal entered in the Clerk's office of the District Court for Alaska Division No. 1 in that certain suit No. 547—A in which Solomon Ripinsky is defendant and appellant and you are plaintiffs and appellees to show cause, if any there be, why the decree rendered against the said defendant and appellant as in the said order allowing an appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this the 3 day of June, 1911.

EDWARD E. CUSHMAN,

Judge Residing in the District Court. [41]

Service of the within Citation is admitted to have been made by delivery of a copy thereof, this 3d day of June, 1911.

L. P. SHACKLEFORD,

Attorneys for Plff.

[Endorsed]: Original. No. 547—A. In the District Court for Alaska, Division No. 1, at Juneau. *G. W. Hinchman et al.*, Plaintiffs, vs. *Solomon Ripinski*, Defendant. Citation. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By ———, Deputy. J. H. Cobb, Attorneys for Defendant. Office: Juneau, Alaska. [42]

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKI,

Defendant.

Order Extending Time to File Transcript.

Upon application of counsel for defendant is ordered that the time for filing the transcript of the record herein be, and the same is hereby, extended to August 15th, 1911.

Dated June 3d, 1911.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: No. 547-A. In the District Court for Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plffs., vs. Solomon Ripinski, Deft. Order Extending Time to File Transcript. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By ———, Deputy. J. H. Cobb, Atty. for Deft. [43]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKI,

Defendant.

Order [Waiving Copying of Printed Record].

Upon application of the parties hereto, it is ordered that the Clerk of this court, in making up the transcript of the record for the appellate court in this cause, do not transcribe the printed record contained in the bill of exceptions, but insert at the proper place in said transcript a duplicate of such printed record furnished by counsel.

Dated this June 3d, 1911.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Original No. 547-A. In the District Court for Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plaintiffs, vs. Solomon Ripinski, Defendant. Order as to Making Transcript. Filed June 3, 1911. E. W. Pettit, Clerk. J. H. Cobb, Attorneys for Deft. Office: Juneau, Alaska. [44]

*In the United States District Court for the District
of Alaska, Division No. 1, at Juneau.*

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Bill of Exceptions.

Be It Remembered, That the above-entitled cause

came on duly and regularly to be heard, upon rehearing, before the Honorable EDWARD E. CUSHMAN, Judge of said court, on Tuesday, the 16th day of May, 1911;

The plaintiffs herein being represented by LEWIS P. SHACKLEFORD, Esq.,

The defendant being represented by JOHN H. COBB, Esq.,

WHEREUPON a statement of the case was made to the Court by the respective attorneys and the following additional proceedings had: [45]

[Proceedings Had May 16, 1911.]

Mr. SHACKLEFORD.—On this, the second trial of this cause, we ask the Court to take judicial notice of the printed record in the United States Circuit Court of Appeals for the Ninth Circuit in case Number 1782, pages 1 to 929, inclusive, being the case of Solomon Ripinsky, appellant, versus G. W. Hinchman et al., appellees, and being the identical case now on trial before the Court.

By the COURT.—The record contains all the evidence admitted on the original trial?

Mr. SHACKLEFORD.—Yes, sir.

By the COURT.—It will be so ordered.

Mr. SHACKLEFORD.—We also ask the Court to take judicial notice of the opinion on the petition for rehearing, filed in the United States Circuit Court of Appeals March 9, 1911; and also the previous opinion rendered upon appeal filed October 3, 1910, and reported in the 181 Federal at page 786.

By the COURT.—It will be so ordered.

Mr. SHACKLEFORD.—We also ask the Court to

take judicial notice of the original complaint in Cause #547-A, being this case, filed on July 2, 1906; summons issued on July 2, 1906; order on motion, signed Royal A. Gunnison, Judge, to make more definite and certain, filed December 10, 1906; order extending time to file amended complaint, signed Royal A. Gunnison, Judge, dated December 26, 1906; amended complaint filed March 28, 1907; order signed James Wickersham, Judge, filed May 7, 1907, striking the portions of plaintiffs' complaint referring to proceedings in the Land Office, on motion of the defendant, and containing the exceptions of the plaintiff thereto; second amended complaint—it is [46] already in the record. The proceedings just referred to do not appear in the printed record and are therefore offered for the judicial notice of the Court at this time for the purpose of showing that the form of the complaint was not voluntarily changed but changed under orders of the Court, to which we excepted.

By the COURT.—This is an offer of evidence, is it?

By Mr. SHACKLEFORD.—I do not think they are evidence. I want them before the Court, though, so they will be a part of the Bill of Exceptions the next time.

By the COURT.—You may make your offer as regards the mandate and judgment on mandate. You will take that up by supplemental record.

Mr. SHACKLEFORD.—I will also offer the mandate of the Circuit Court of Appeals and the judgment on the mandate, coupled with the statement that we shall move at the proper time during the pro-

ceedings to retax costs adjudged under the mandate and under the judgment on the mandate.

By the COURT.—It will be admitted and considered, together with the filing marks on the mandate.

Mr. SHACKLEFORD.—Judge Lyons was the attorney who conducted this case and I am not entirely familiar with the record myself. It has suggested itself to me, in order to get a clear understanding of the case, it will probably be to our advantage to read the testimony. I want to consult the Court's convenience about time, but I am perfectly willing to read the plaintiffs' testimony.

By the COURT.—You will be controlled by your own judgment as to what is best in the matter.

Whereupon Mr. Shackleford read the testimony on behalf of the plaintiffs in the previous case and which is found in [47] the printed record in the United States Circuit Court of Appeals for the Ninth Circuit, in Case Number 1782, being the case of Solomon Ripinsky, appellant, versus G. W. Hinchman et al., appellees.

Mr. SHACKLEFORD.—The plaintiffs offer in evidence for the inspection of the Court the original deed, being Defendant's Exhibit #7, for the purpose of demonstrating the method of interlineation on the margin of the deed and the manner in which the same was drawn and executed; and the plaintiffs also object to all oral testimony herein concerning the conveyance of the original trading site, or the purchase of the original trading site from the *Norwest Trading Company*, to Dickinson as being incompetent, irrele-

vant and immaterial and not the best evidence and as hearsay. And we also object to and move to strike all testimony concerning alleged conversations between the defendant herein, Ripinsky and the Dickinsons as to the acquisition of the said title from the Northwest Trading Co., move to strike the same and also to strike the evidence found on pages 595 and 596, in which the defendant Ripinsky attempts to testify to the date of the transfer from the Northwest Trading Co. to the defendant as occurring in the commencement of 1884.

By the COURT.—The original deed will be admitted and submitted. The motions will be denied and exceptions allowed.

Mr. COBB.—The defendant asks the Court to take judicial notice of the order of this Court found on page 96 of Volume 8 of the Journal, dated July 15, 1899, reading as follows:

“Saturday, July 15, 1899.

In the Matter of the Appointment of SOLOMON
RIPINSKY as United States Commissioner
for the District of Alaska, at Haines.

Whereas, it satisfactorily appearing to the Court that a [48] United States Commissioner should be appointed for Haines, in the District of Alaska, and it further appearing that Sol Ripinsky is a resident of said Haines, is a citizen of the United States over the age of twenty-one years and is a proper and suitable person to be appointed United States Commissioner, to be located and to reside at Haines, Alaska;

It is therefore ordered that the said Sol Ripinsky be and he is hereby appointed a United States Com-

missioner for the District of Alaska, to reside at Haines, Alaska, and authorized and empowered to fulfill the duties of the office according to law, with all the powers, privileges and emoluments of right pertaining to him, during the pleasure of this Court and until his successor is appointed and qualified."

Mr. SHACKLEFORD.—It seems that the defendant in this case is raising a new issue about the citizenship and I may want to offer some evidence before the trial is closed.

By the COURT.—That is concerning—

Mr. SHACKLEFORD.—That is concerning both parties.

Mr. COBB.—There has been no issue raised as to the citizenship further than was in the case before.

Mr. SHACKLEFORD.—It is the first time I have noticed it.

[Proceedings Had May 18, 1911.]

May 18, 1911.

Mr. SHACKLEFORD.—We desire to call Mr. H. Fay for the purpose of proving the citizenship of most of the plaintiffs in this case.

Mr. COBB.—The defendant objects for the following reasons: That this case was not sent back for retrial or the taking of further evidence, but only for the Court to enter the proper judgment under the opinions of the Court in case [49] the pleadings should be reformed as intended in the second opinion; for the further reason that the testimony was taken by a referee, all of the record, and there is no motion made to recommit or take further testimony and it is now too late to make the proof; for the further reason that when the testimony was taken the issue

as to the citizenship of the plaintiffs was then made and no testimony offered.

By the COURT.—It is not for the purpose of introducing evidence extensively, is it?

Mr. SHACKLEFORD.—No, sir; Mr. Cobb has started in since these pleadings were reformed to make a question about citizenship and the only thing I ask is the same privilege he has been granted with reference to his part of the evidence.

By the COURT.—I am not absolutely sure what shape the record in this case is now in, whether when the pleadings were reformed the cause might not have been recalled to the Court of Appeals by a recall of the mandate and the further disposing of the petition for rehearing, or whether it should again be appealed after its decision, the decision in this court upon the rendition of this evidence or the resubmission of it. However that may be, the evidence will be admitted.

Mr. COBB.—Before the Court rules upon it, I want to correct a statement of counsel that I have introduced a new issue into it. In the second amended complaint tried before, they expressly pleaded the citizenship of the townsite claimants and there is a denial of that.

Mr. SHACKLEFORD.—You do not claim that you offered any evidence of Mr. Ripinsky's citizenship on the former trial?

Mr. COBB.—The evidence is in the record; I have introduced none this time; I have merely called the attention of the [50] Court to it.

The objection was by the Court overruled; to which ruling defendant excepts—exception allowed.

[Testimony of H. Fay, for Plaintiffs.]

H. FAY, called and sworn as a witness in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. SHACKLEFORD.)

Q. You are one of the parties to this case?

A. Yes, sir.

Q. I am going to call off the names of the plaintiffs in this case to you and whenever your knowledge permits you to state, why you may state whether or not they are citizens.

Mr. COBB.—I shall object to that method of examination as not being fair; it is merely calling for his conclusion without explaining what his knowledge is, except what may be in his own mind.

By the COURT.—You may cross-examine.

(By Mr. SHACKLEFORD.)

Q. Do you know whether Mr. Hinchman is a citizen? A. Yes, sir.

Q. Is he? A. Yes, sir.

Q. William Holgate? A. Yes, sir.

Q. John G. Morrison? A. Yes, sir.

Q. J. A. Nettles? A. Yes, sir.

Q. Cortz Ford? A. Yes, sir.

Q. Tom Valeur? A. Yes, sir. [51]

Q. R. M. Odell? A. Yes, sir.

Q. D. Butrich?

A. I don't know with respect to him.

Q. E. J. Berger?

A. I am not sure about Berger.

Q. Ida Johnson? Who is Ida Johnson?

(Testimony of H. Fay.)

A. She is a woman that owns a house there; Stout is agent for her.

Q. The lot was originally located by her husband?

A. No, I believe she bought it.

By the COURT.—Keep to the citizenship.

Q. Is she a native woman?

A. No, she is a white woman.

Q. M. E. Handy? A. Yes, he is a citizen.

Q. Fred Handy? A. Yes, sir.

Q. G. C. Dehaven? A. Yes, sir.

Q. Tim Creedon? A. Yes, sir.

Q. Benjamin A. Mahan? A. Yes, sir.

Q. Thomas Dryden?

A. No, Tom Dryden is not a citizen.

Q. Ed Fay? A. Yes, sir.

Q. James Fay? A. Yes, sir.

Q. H. Fay? A. Yes, sir.

Q. W. W. Marne? A. Yes, sir.

Q. Thomas Vogel?

A. Yes, sir; that should be Tim Vogel.

Q. C. Bjornstad? A. Yes, sir.

Q. H. Rappolt?

A. I don't know about Rappolt. [52]

Q. Karen Bjornstad?

A. She is a mother of Carl Bjornstad; he represented her property.

Q. M. V. McIntosh? A. That is Mrs. McIntosh.

Q. What about her being an American citizen?

A. She is an American citizen.

Q. Mary V. McIntosh?

A. Yes, that is her daughter; she is an American citizen.

(Testimony of H. Fay.)

Q. Jesse Craig?

A. He is a citizen of the United States.

Q. E. A. Adams? A. Yes, sir.

Q. J. W. Martin? A. Yes, sir.

Q. A. J. Dennerline? A. Yes, sir.

Q. S. J. Weitzman? A. Yes, sir.

Q. Peter Johnson?

A. I am not sure about Johnson.

Q. Kate Kabler?

A. Mrs. Kabler lived in Juneau here for quite a while.

Q. V. Reade? A. I am not sure about Reade.

Mr. SHACKLEFORD.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. When did you first become acquainted with William Holgate?

A. Well, I don't know as to the time when he first came there.

Q. Well, about when, Mr. Fay?

A. Well, it would be guesswork now; he has been there I should judge about five or six years.

Q. About five or six years? A. Yes, sir. [53]

Q. You didn't know him before that?

A. No, sir.

Q. You don't know where he was born, of your own knowledge? A. No, sir.

Q. You don't know whether he has been naturalized or not? A. No, sir.

Q. How do you know he is a citizen then, of your own knowledge?

(Testimony of H. Fay.)

A. Well he has voted there at Haines during my time.

Q. That is all that you base it upon?

A. Well, yes.

Q. For all you know he may have been born in some foreign country and never was naturalized?

A. Yes, sir.

Q. How long have you known George W. Hinchman?

Q. Well, since Hinchman came to the country, he has been there probably eight or nine years, probably more.

Q. You don't know where he was born?

A. No, sir.

Q. You don't know whether he was born in a foreign land or in America? A. No, sir.

Q. John G. Morrison, how long have you known him?

A. Well, I have known him about eight or nine years.

Q. Do you know where he was born?

A. No, sir.

Q. You do not know whether it was in a foreign land or America? A. No, sir.

Q. J. A. Nettles, how long have you known him?

A. About the same time, I guess.

Q. Do you know where he was born? [54]

Q. For all you know he may have been born in some foreign land? A. Yes, sir.

Q. Cortz Ford—how long have you known him?

A. I have known him about seven or eight years,

(Testimony of H. Fay.)

probably more, eight or nine, eight years, I guess it was all of that.

Q. You don't know where he was born?

A. No, sir.

Q. For all you know he may have been born in some foreign land? A. Yes, sir.

Q. Of foreign parents? A. Yes, sir.

Q. Tom Valeur—do you know where he was born?

A. No, sir.

Q. For all you know he may have been born in some foreign land? A. Yes, sir.

Q. And never naturalized? A. Yes, sir.

Q. R. M. Odell, how long have you known him?

A. Oh, about nine years or ten years.

Q. Do you know where he was born?

A. No, sir.

Q. As far as you know he may be a citizen of some foreign land?

A. Well, I don't think he would be a citizen of some foreign land if he would vote there in Haines.

Q. That is all you know about it? A. Yes, sir.

Q. Apart from that, though, as far as you know he may be a citizen of some foreign land? [55]

A. Yes, sir.

Q. D. Butrich you say is not a citizen?

A. I say I don't know whether he is or not.

Q. E. J. Berger, you say you don't know?

A. No.

Q. Ida Johnson you don't know—how long have you known M. E. Handy?

A. Nine or ten years, about.

(Testimony of H. Fay.)

Q. Do you know where he was born?

A. No, sir.

Q. You don't know but what he might have been born in some foreign land? A. No, sir.

Q. Of foreign parents? A. Yes, sir.

Q. Fred Handy is a brother of M. E. Handy, is he?

A. He is a son.

Q. He is a son? A. Yes, sir.

Q. Do you know where he was born?

A. No, sir.

Q. So far as you know he might have been born in a foreign land? A. Yes, sir.

Q. G. C. DeHaven, how long have you known him?

A. About ten years.

Q. Do you know where he was born? A. No, sir.

Q. As far as you know he might have been born in some foreign land? A. Yes, sir.

Q. Tom Creedon, do you know where Tim was born? [56] A. No, I do not.

Q. As far as you know he might have been born in some foreign land? A. Yes, sir.

Q. B. A. Mahan, how long have you known Mr. Mahan? A. About six or seven years.

Q. That is as long as he has been in Haines?

A. Yes, sir.

Q. As far as you know he may have been born in some foreign land? A. Yes, sir.

Q. Thomas Dryden you say is not a citizen?

A. I don't think he is.

Q. Ed Fay and James Fay and H. Fay do you know are citizens? A. Yes, sir.

(Testimony of H. Fay.)

Q. Ed and James are your brothers?

A. Yes, sir.

Q. W. W. Warne, how long have you known him?

A. Well, he was in the country when I came, he was at Haines when I came.

Q. He has been gone eight or ten years?

A. Yes, he has been gone quite *while*.

Q. Do you know where he was born?

A. No, sir.

Q. As far as you know he may have been born in a foreign land? A. Yes, sir.

Q. And of foreign parentage? A. Yes, sir.

Q. Thomas Vogel or Tim Vogel as he is sometimes called, how long have you known Tim?

A. Ten or eleven years. [57]

Q. Do you know where he was born?

A. No, sir.

Q. As far as you know he may have been born in a foreign land? A. Yes, sir.

Q. And of foreign parents? A. Yes, sir.

Q. C. Bjornstad, how long have you known Mr. Bjornstad? A. About ten years.

Q. Do you know where he was born? A. No, sir.

Q. So far as you know he may have been born in a foreign land? A. Yes, sir.

Q. Of foreign parents?

By the COURT.—He didn't say Mr. Bjornstad was a citizen, did he?

The WITNESS.—Yes, sir.

Q. H. Rappolt, I believe you stated you did not know whether Rappolt was a citizen or not?

(Testimony of H. Fay.)

A. No, sir.

Q. Karen Bjornstad, do you know where she was born?

A. No, sir; that is the mother of Carl Bjornstad?

Q. She is the mother of Carl and you don't know where either one of them was born?

A. Well, they told me—

Q. I mean of your own knowledge?

A. No, I do not.

Q. And so far as you know they may have been born in a foreign land, of foreign parentage?

A. Yes, sir.

Q. M. V. McIntosh, how long have you known her?

A. About seven or eight years. [58]

Q. Do you know where she was born?

A. No, sir.

Q. So far as you know she may have been born in a foreign land of foreign parentage?

A. Yes, sir.

Q. Mary V. McIntosh is a daughter of the other you said? A. Yes, sir.

Q. Do you know where she was born?

A. No, sir.

Q. So far as you know she may have been born in a foreign land, of foreign parentage? A. Yes, sir.

Q. Jesse Craig, do you know where he was born?

A. No, sir.

Q. So far as you know he may have been born in a foreign land and of foreign parentage?

A. Yes, sir.

Q. E. A. Adams, how long have you known him?

(Testimony of H. Fay.)

A. About eleven years or such a matter.

Q. Do you know where Mr. Adams was born?

A. No, sir.

Q. So far as you know he may have been born in a foreign land and of foreign parentage?

A. Yes, sir.

Q. J. W. Martin, how long have you known Martin? A. About twelve years.

A. Do you know where he was born?

A. No, sir.

Q. So far as you know he may have been born in a foreign land and of foreign parentage?

A. Yes, sir. [59]

Q. A. J. Dennerline, do you know where he was born? A. No, sir.

Q. As far as you know he may have been born in a foreign land and of foreign parentage?

A. Yes, sir.

Q. S. J. Weitzman, do you know where Mr. Weitzman was born? A. No, sir.

Q. So far as you know he may have been born in a foreign land and of foreign parentage?

A. Yes, sir.

Q. Peter Johnson, you say you don't know; Mrs. Kate Kabler, you say you don't know?

A. No, I do not; she lives in Juneau.

Q. And V. Reade you don't know?

A. I don't know about Reade.

Mr. COBB.—That is all.

(By Mr. SHACKLEFORD.)

Q. All these men that have been mentioned have

(Testimony of H. Fay.)

exercised the privileges of citizenship up there, haven't they?

Mr. COBB.—We object as not the best evidence.

By the COURT.—It is leading.

Q. State what you do know about their exercising the privilege of citizenship.

Mr. COBB.—I object to that as calling for a conclusion of the witness.

Objection overruled; to which ruling counsel for defendant excepts; exception allowed.

Q. Just state what you know about their exercising the privileges of citizenship.

A. Why, they exercise the privileges of citizenship. [60]

Mr. SHACKLEFORD.—That is all, Mr. Fay, at this time.

May 19, 1911.

[Testimony of H. Fay, for Plaintiffs (Recalled).]

H. FAY, recalled.

Direct Examination.

(By Mr. SHACKLEFORD.)

Q. Mr. Fay, you were one of the citizens committee in charge of the protection of their rights up there?

A. Yes, sir.

Q. I will ask you to state whether, if you know, *applicati* was made by the citizens of Haines for a townsit^e survey?

Mr. COBB.—We object as not the best evidence; if they *mad* an application it would necessarily be on record.

Mr. SHACKLEFORD.—I will explain to the

(Testimony of H. Fay.)

Court exactly the reason I ask Mr. Fay this question. Mr. Stowell's record shows probably 30 or 40 letters on the subject back and forth and finally the request was rejected. I don't want to encumber the record with a lot of correspondence. I can have it certified and file it with the Court if necessary, but I simply want to show that the application was made.

Mr. COBB.—Counsel has stated the objection to it, as well as it could be stated. In the first place it is a matter of record; in the next place if they have the record here it will show that the request was rejected.

Mr. SHACKLEFORD.—I will ask leave to file, after the argument of the case, a certified copy of the correspondence and withdraw the witness.

Mr. COBB.—I shall object to that, it is a reopening of the case. This case was tried before a Referee; they plead that in the original case, and for the further reason that so far as the plaintiffs are concerned in this case, the question [61] of their right, title and interest is no longer an open one; it has been finally foreclosed by the judgment of the Appellate Court, the court of last resort.

By the COURT.—That is all, Mr. Fay. I will rule on the offer of the evidence when the offer is made. It will be ruled on when you offer it the same as though it was offered now.

Mr. COBB.—Of course if the Court should admit it, we will reserve the right to introduce any further testimony we might deem advisable.

By the COURT.—Very well.

AFTERNOON SESSION.

Mr. SHACKLEFORD.—In this Haines case I desire to offer in evidence a certified copy of letter of July 17, 1905, W. A. Richards, Commissioner of the General Land Office to the U. S. Surveyor General at Sitka, Alaska, certified to by the Surveyor General and ask to have it marked. It is marked Exhibit "A," 2d Hearing.

By the COURT.—It will be admitted.

Mr. SHACKLEFORD.—I will read it.

[Exhibit "A"—20 Hearing.]

"COPY.

E

C. L. D. B.

A. W. B.

110273-1905

Department of the Interior

General Land Office,

Washington, D. C., July 17, 1905.

Address only the

Commissioner of the General Land Office.

Subject: Survey of Haines Townsite.

U. S. Surveyor General,

Sitka, Alaska.

Sir:

I have received your letter dated June 15, 1905, transmitting [62] a copy of the petition of George Vogel and 57 other settlers at Haines, for the official survey of the boundary of a townsite, also copy of the proposals of Deputy C. E. Davidson for making surveys, addressed to Mr. C. Ford of Haines.

The petition has been favorably considered, although any further action should be contingent upon

the action that may be taken upon a homestead entry that may be made by Sol Ripinsky under Survey No. 573.

If said survey shall be approved in your office, as authorized, the applicant's right to make entry would be next considered; and the Department should not incur the expense of a townsite survey under the present uncertainty of these conditions.

The bid of Mr. Davidson shows that he is not aware that the work must be done under two different proposals which cannot be combined as he has done. If the survey is authorized, the boundary will be done under contract or instructions from your office, and paid for by the United States; but the sub-division must be done under contract with the trustee representing the people, and paid for from proceeds of sale. You will advise bidders accordingly.

Moreover, while the Haines people may choose to award the work to none but Deputy Davidson, the exterior line must be a subject of proper notices to deputies who are near enough to be probable bidders. In the survey of the boundary, the condition proposed by this deputy as to citizens paying his expenses could not be considered. Neither will you approve a proposition for a certain sum for field work and a per diem for unlimited time for making plats, as found in his bid.

From all the above, it is evident that the townsite boundary cannot very soon be provided for.

Very respectfully,

(Signed) W. A. RICHARDS,

Commissioner. [63]

J C P

Office of the U. S. Surveyor General.

Juneau, Alaska, May 19, 1911.

I certify that the foregoing and attached transcript of a letter from the Commissioner of the General Land Office to the U. S. Surveyor General of Alaska, dated July 17, 1905, "Subject: Survey of Haines Townsite" is a true and correct copy of said letter, and of the whole thereof, now on file in this office.

(Signed) WM. L. DISTIN,

U. S. Surveyor General for Alaska. [64]

And after the evidence had all been heard by the Court the defendant prayed the Court to find as follows:

[Findings Requested by Defendant.]

1st. The land in controversy in this suit was on the 14th day of December, 1897, in the actual possession and occupancy of the defendant, Solomon Ripinsky, under a deed and claim of ownership hereinafter set out. And afterwards on the said date the plaintiff, H. Fay and a number of other persons, none of who are parties to this suit, or now claim any of the property in controversy, entered upon said property and forcibly and against the protests of the defendant ousted him therefrom and said parties thereafter laid out a townsite or attempted to, embracing the land in controversy, and had one Fogelstrom to make a plat of the same into lots, blocks and streets. Some of the said premises was located as town lots, some as trade and manufacturing sites, some as homesteads and a part was not located at all. Other persons followed and locations have been made by the plaintiffs from that date

promiscuously up till after the institution of this suit, but all such locations and occupancies as were made and asserted by the plaintiffs were against the protest and rights of the defendant.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

2d. The ground in controversy was surveyed for one George Dickinson by an officer of the U. S. "Jamestown" in the year 1871. Dickinson at that time was acting for a concern known as the Northwest Trading Company and the tract so surveyed was at that time fenced and the corner posts set and buildings were constructed thereon and a portion cleared and cultivated. In the year 1880 George Dickinson succeeded to [65] interests of the Northwest Trading Co. and from that year to the year 1888 when he died, Dickinson and his family continued to occupy said premises, residing thereon and cultivating a portion thereof, and the said Dickinson and his family were in the occupancy, possession and claim of said premises on the 17th day of May, 1884.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

3d. In 1888 George Dickinson died and left surviving him his wife, Sarah Dickinson, his son William Dickinson. Mistress Sarah Dickinson, was a native Alaska woman. The *dickinson* family continued in the possession and claim of said premises until the 2d day of December, 1897, upon which date

she sold and conveyed said premises to the defendant, Solomon Ripinsky and placed him in possession thereof and on the 21st day of December, William Dickinson also sold whatever interest he had in said premises to the defendant, said Ripinsky.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

4th. On the 14th day of December, 1897, the plaintiff Harry Fay, accompanied by some five or six other men, because of the report that a railroad was to be built from that point, went from the village of Chilcat, Alaska, about a mile distant from the property in controversy in this suit and against the protest and with a disregard of the rights and possession of the defendant, entered upon said premises and made locations thereon of town lots, locations for trade, and manufacturing sites, etc., and thereafter had one Foglestrom lay out some six blocks of ground embracing the property in controversy, into blocks and lots, substantially as shown upon the plat attached to the third amended complaint. [66]

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

5th. On June 23d, 1903, the defendant, Solomon Ripinsky, posted and filed a notice of location of his homestead embracing all the land in controversy and also the buildings and improvements then and now occupied by him and purchased from the Dickinsons.

Thereafter on March 23-26, 1905, the defendant had survey No. 573 made by U. S. Deputy Surveyor, C. E. Davidson, as his homestead claim, which survey was officially approved on July 31, 1905, by the Surveyor General for Alaska. This survey embraced all the land in controversy. After the survey was made the defendant's notice of homestead location *location* was amended to conform to the official field-notes.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

6th. Thereafter the defendant duly and regularly applied for patent for the said premises as his homestead, and published his notice as required by law, when the plaintiffs filed the adverse claim a copy of which is attached to the third amended complaint and instituted this suit.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

7th. The land in controversy in this suit is claimed by the plaintiffs in severalty and not jointly, and embraces the following lots and blocks shown on the plat "Exhibit No. 1," in so far as the same is in conflict with the U. S. Survey No. 573, to wit:

Lots 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 14, 15, 16, and [67] 17, of Block 1.

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of Block 2.

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, and 12 of Block 3.

Lots 1, 3, 4, 5, and 6 of Block 4.

Lots 1, 2, 3, 4, 5, and 6 of Block 5.

And lot 2 of Block 6.

The balance of the land embraced within Survey No. 573 is not claimed by any of the plaintiffs.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

8th. Plaintiffs have failed to prove that any of them are citizens of the U. S. except the three Fays.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

10th. The plaintiffs have failed to show any interest, jointly, severally or otherwise in any of the streets, avenues or alleys mentioned in the complaint.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

11th. The defendant, Solomon Ripinsky, is a citizen of the U. S., qualified to enter lands as a homestead and has fully complied with the law, entitling him to enter the premises in controversy.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

[Conclusion Etc. Requested by Defendant.]

The defendant further prayed the Court to conclude as matter [68] of law as follows:

1st. That the defendant's grantors were protected in their possession and claim to said premises by the 8th section of the act of May 17, 1884, and they conveyed a good title to the defendant which he was entitled to enter as his homestead under the act of Congress extending the homestead laws to Alaska.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to rule as matter of Law as follows:

3d. The defendant is entitled to a judgment on his cross-complaint for the ground in controversy and for his costs.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

And thereafter the Court having fully considered the case announced its opinion as follows: [69]

[Opinion.]

By the COURT.—In this Hinchman vs. Ripinsky case I feel constrained to decide the case largely, if not entirely, upon what I consider the law of the case. The case was started before Judge Gunnison, a suit to quiet title of these plaintiffs against the defendant, started as an adverse suit, but upon the part of the defendant two or more motions were made, one to make more specific by setting out the particular parcels of ground within the alleged townsite claimed by the plaintiffs and the other striking out all reference to the proceedings in the land office showing it to be an adverse suit. These motions were granted. When the evidence was all in, being taken before the referee, Judge Gunnison decided,

making general findings in favor of the plaintiffs and making general findings against the defendant, particularly finding that the defendant did not obtain any right by reason of the transfer from the Dickinsons and that he did not have any right other than the right in two particular tracts, small tracts, that were conceded to him by the pleadings. From this decision an appeal was taken by the plaintiffs to the Court of Appeals and in the review of the case by the Court of Appeals, they go generally into two propositions; First, the defendant's demurrer that had been interposed below to the misjoinder of parties plaintiff; and Second, into the character of the title of plaintiffs.

The Court of Appeals decided: First, that there was a misjoinder of plaintiffs in that there was nothing common in their title; that although they were all fighting Mr. Ripinsky, that some claimed title by possession, some claimed title by location of a lot and some claimed title by location of a trading and manufacturing site, and some by having bought somebody else's possession and in various other ways, and their rights being so diversified and several, that they could not join in [70] one suit against the defendant. Second, they decided—I will read from the opinion:

“From the facts as portrayed by the testimony, it appears that some of these complainants have no shadow of claim of title, except mere possession. They have no location under the alleged townsite of Haines, no deed from previous holders, if this were sufficient, and no pretense that they are claiming under authority of Congress. It is not even shown that

a site has ever been entered for townsite purposes on pursuance of the laws of Congress as extended to Alaska. Section 11, Act of March 3, 1891, c. 561, 26 Stat. 1099 (U. S. Comp. St. 1901, P. 1467); 1 Fed. St. Ann. 53. And the extent of the right acquired in alleged pursuance of the townsite statute is that of mere possession only, with the privilege, perhaps of regularly entering a townsite in the future, if the citizens so desire when their rights will depend upon prior possession. It does not seem to us that such possession exhibits a sufficient equitable title upon which to base a suit to remove a cloud, and we so hold."

Now, after so deciding, upon the petition for rehearing in which it was called to the attention of the Appellate Court that this had been instituted as an adverse suit, after the defendant's application in the land office and the advertisement for adverse claimants and the filing of an adverse, the Court then held that the complaint was sufficient, as follows:

"It appears from the original complaint that the complainants attempted to pursue the requirements of the statutes, and that it was the endeavor to settle an adverse claim to the claim of the defendant Ripinsky in pursuance thereof. Among other things, it is shown that Ripinsky filed his application for patent on the 2d day of March, 1906, and thereafter published notice; and on June 3, 1906, and within 30 days after the period of publication of said notice, the plaintiffs filed in the land office their notice of adverse claim, a copy of which is annexed to the complaint. If that complaint was filed immediately after the date of its verification, the action would have been com-

menced within the requisite 60 days. So that for all the purposes of prosecuting an action for the quieting of the title as adverse claimants, under the statutes (Sec. 10), the complaint appears to be sufficient."

It would seem that that left the case in this shape, that there was little for this Court to do, the issues and evidence being substantially the same, but to martial the different findings and rulings of the lower court and the Court of Appeals [71] into one decree. It may be that the proper proceedings would have been after the pleadings were reformed to move in the Court of Appeals for a recall of the mandate and let that Court decide this case as it appears to have intimated at the close of their decision.

After having ruled that the original complaint was sufficient on an error that was not assigned, indeed, an error committed against the eventually prevailing part, the Court of Appeals must have been then in this position, that they could not anticipate what the issues would be on the pleadings as reformed, or what the evidence might be, if any were taken.

It was, therefore, probably considered by it illogical for that Court in anticipation to decree that its finding regarding the sufficiency or insufficiency of plaintiffs' title would apply to the new pleadings and the new proofs. It is probably true as a general rule that on an order for rehearing all parts of the old opinion not expressly adopted are abandoned but this case would seem to be an exception to that rule.

The decision of Judge Gunnison that the defendant had no right has been in no way reversed, therefore it is the opinion of this Court that that is a part of

the law of this case, in so far as it is applicable to the new issues and the new proof, both of which so far as the claim of the defendant is concerned have not been materially changed by the reforming of the pleadings or by the additional evidence that has been offered.

This Court is not clear that on an adverse suit brought to quiet title that any less title or any different title is sufficient to maintain such an adverse suit than that that would maintain a suit to quiet title under our statutes. In fact, if there is any difference, the stricter rule would prevail in the former case, for, in an adverse suit, the plaintiff, to [72] succeed, must not only show a better title than the defendant but show title also as against the United States.

The Court of Appeals have decided that under our statute the evidence in this case was not sufficient to warrant a decree in favor of plaintiffs. Therefore, the finding of that Court being that the title of the plaintiff was insufficient to give them a decree removing a cloud or quieting the title, this Court will hold that that is the law of this case as far as the plaintiffs are concerned. The obstacles in the way of plaintiffs' title pointed out by the Court of Appeals, on account of there being no boundaries to the alleged town or townsite, have not been removed on the last hearing, likewise no period of time when the alleged title is initiated. The case cited in the petition for rehearing was one pending after townsite entry, between the trustee and the *cestui que trust*.

This being an adverse suit in which both sides may

lose except as to costs, the decree will be to that effect; the defendant will recover costs.

The finding of Judge Gunnison regarding plaintiffs' possession or occupancy—you will have to work out a finding to modify that as modified by the Court of Appeals, eliminating particularly those parts outside the Foglestrom plat. Under the regulations of the land office the survey of the boundaries of a townsite is made by the land office and paid for out of public money. It seems by the evidence that was offered by the plaintiffs on this trial that Vogel and 57 others had petitioned, though the petition is not in evidence, that such a survey be made, but the land office, while approving in general terms of their application, had declined to go to the expense of this survey until Ripinsky's right to this homestead had been determined and until that was done, as pointed out by the Court of Appeals, this town of Haines had no boundaries, had no limits. [73] it was an indefinite settlement. The Court will adopt the Fogelstrom plat as defining at that time the limits of their claim, but the Court will hold that as to the ground included in Survey 573 that fell outside of the Fogelstrom plat, they had or made no claim except by this suit; their claim of occupancy or possession of that will be rejected.

The Court will find that the plaintiffs that Mr. Fay testified to as being citizens of the United States were citizens of the United States. The Court will find that Mr. Ripinsky is a citizen of the United States.

And thereupon the defendant by its counsel excepted to the ruling and opinion of the Court that the

decision of Judge Gunnison that the defendant had no right has been in no way reversed, therefore it is the opinion of this Court that that is a part of the law of this case in so far as it is applicable to the new issues and the new proofs, both of which so far as the claim of the defendant is concerned will not be materially changed by the reforming of the pleadings or by the additional evidence that has been offered; on the ground that the same was not the law and that it was the duty of the Court to make up findings as to the defendant's title from the evidence before it and said exceptions allowed. [74]

And the above and foregoing, to wit: the testimony and proofs contained in the printed record of this case on the former appeal, No. 1782 in the said Appellate Court, which testimony is contained in the said printed record from and inclusive of page 57 thereof down to and inclusive of page 886; the oral evidence of H. Fay, and the record from the Surveyor General's Office and the record of this Court as to the citizenship of the defendant, was all the evidence offered by the parties hereto, or received by the Courts; and the said evidence, and the foregoing exceptions of the defendant are hereby certified by me to be correct, are allowed, ordered filed, and made a part of the record of this case.

And it is further ordered that the foregoing bill of exceptions may and does constitute the plaintiffs' bill of exceptions, except that plaintiff may have his bill of exceptions certified to the Appellate Court without attaching thereto volumes 1, 2 and 3 of the printed record in this case, numbered Case 1782,

heretofore printed in the Appellate Court, the entire contents of which volumes were referred to and used by the plaintiff in the last trial of this case before this Court. This order is made pursuant to stipulation of counsel on file herein.

Done in open court this 12th day of June, 1911, and during the term at which said cause was tried.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: No. 547-A. In the District Court for the District of Alaska, Division No. 1. *G. W. Hinchman et al. vs. Solomon Ripinsky*. Bill of Exceptions. Filed Jun. 12, 1911. E. W. Pettit, Clerk. By —————, Deputy. [75]

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Praeipce for Transcript.

To the Clerk of the District Court of Alaska Division No. 1:

You will please make up the transcript of the record for appeal of the above-entitled and numbered cause and include therein the following papers, documents on file and of record in your office to wit: (1) Third amended complaint filed May 13, 1911. (2) Demurrer to third amended complaint, filed May 15, 1911. (3) Order overruling same, entered May 15,

1911. (4) Answer to third amended complaint filed May 15, 1911. (5) Findings of fact and conclusions of law, filed May 29, 1911. (6) Decree, filed May 29, 1911. (7) Petition for appeal, filed June 3, 1911. (8) Order allowing appeal, filed June 3, 1911. (9) Assignment of errors, filed June 3, 1911. (10) Bond, filed June 3, 1911. (11) Citation and return thereon. (12) Order extending time to file transcript. (13) Order in re making transcript, filed June 3, 1911. (14) Bill of exceptions. (15) This praecipe. (16) Certificate of clerk.

Said transcript to be made up and transmitted to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit San Francisco, in accordance with the rules or practice of the said Circuit Court of Appeals and of this court.

Dated July 11, 1911.

R. W. JENNINGS and
J. H. COBB,
Attorneys for S. Ripinsky,

[Endorsed]: No. 547-A. In District Court for Alaska, Division No. 1, Juneau, Alaska. G. W. Hinchman et al. vs. Solomon Ripinsky. Praecipe for Transcript. Filed July 11, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy.

[Endorsed]: No. 547-A. G. W. Hinchman et al., Plaintiffs, vs. Solomon Ripinsky, Defendant. Praecipe for Transcript. [76]

[Clerk's Certificate to Transcript.]

In the District Court for the District of Alaska, Division No. 1, At Juneau.

No. 547-A.

G. W. HINCHMAN, WILLIAM HOLGATE,
JOHN G. MORRISON, J. A. NETTLES,
CORTEZ FORD, TOM VALEUR, R. M.
ODELL, D. BUTRICH, E. J. BERGER,
IDA JOHNSON, M. E. HANDY, FRED
HANDY, G. C. DE HAVEN, TIM CREE-
DON, BENJAMIN A. MAHAN, THOMAS
DRYDEN, ED FAY, JAMES FAY, H. FAY,
W. W. WARNE, THOMAS VOGEL, C.
BJORNSTAD, H. RAPPOLT, KAREN
BJORNSTAD, M. V. McINTOSH, MARY
V. McINTOSH, JESSE CRAIG, E. A.
ADAMS, J. W. MARTIN, A. J. DENNER-
LINE, S. J. WEITZMAN, PETER JOHN-
SON, Mrs. KATE KABLER and V. READE,

Plaintiffs and Appellees,

vs.

SOLOMON RIPINSKY,

Defendant and Appellant.

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division No. 1, do hereby certify that the foregoing and hereto attached seventy-six pages of typewritten and written matter, numbered from one to seventy-six, both inclusive, and

the three printed volumes of the record in Cause No. 1782 in the United States Circuit Court of Appeals for the Ninth Circuit; constitute a full, true and complete record, and the whole thereof, on appeal, as requested in the praecipe of the appellant, filed herein and made a part hereof, in Cause No. 547-A. entitled: G. W. Hinchman, William Holgate, John G. Morrison, J. A. Nettles, Cortez Ford, Tom Valeur, R. M. Odell, D. Butrich, E. J. Berger, Ida Johnson, M. E. Handy, Fred Handy, G. C. De Haven, Tim Creedon, Benjamin A. Mahan, Thomas Dryden, Ed. Fay, James Fay, H. Fay, W. W. Warne, Thomas Vogel, C. Bjornstad, H. Rappolt, Karen Bjornstad, M. V. McIntosh, Mary V. McIntosh, Jesse Craig, E. A. Adams, J. W. Martin, A. J. Dennerline, S. J. Weitzman, Peter Johnson, Mrs. Kate Kabler and V. Reade, Plaintiffs and Appellees vs. Solomon Ripinsky, Defendant and Appellant; and the Order of the Court made and entered on the 3d day of June, 1911, and contained in said record.

I do further certify that the said record is by virtue of the order allowing appeal and the citation issued herein and made a part hereof, and the return in accordance therewith.

I do further certify that the said record has been prepared by me in my office, and the cost of preparation, examination and certificate, amounting to Twenty-three and 60/100 Dollars (\$23.60) has been paid to me by John H. Cobb, Esquire, attorney for the appellant.

In witness whereof I have hereunto set my hand

and the official seal of the above entitled court this 8th day of August, 1911.

[Seal]

E. W. PETTIT,

Clerk of District Court, Dist. of Alaska, Division
No. 1.

[Endorsed]: No. 2015. United States Circuit Court of Appeals for the Ninth Circuit. Solomon Ripinsky, Appellant, vs. G. W. Hinchman, William Holgate, John G. Morrison, J. A. Nettles, Cortez Ford, Tom Valeur, R. M. Odell, D. Butrich, E. J. Berger, Ida Johnson, M. E. Handy, Fred Handy, G. C. De Haven, Tim Creedon, Benjamin A. Mahan, Thomas Dryden, Ed. Fay, James Fay, H. Fay, W. W. Warne, Thomas Vogel C. Bjornstad, H. Rappolt, Karen Bjornstad, M. V. McIntosh, Mary V. McIntosh, Jesse Craig, E. A. Adams, J. W. Martin, A. J. Dennerline, S. J. Weitzman, Peter Johnson, Mrs. Kate Kabler, and V. Reade, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed August 15, 1911.

F. D. MONCKTON,

Clerk.

By Meredith Sawyer,

Deputy Clerk.

At a stated term, to wit, the September term A. D. 1911, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom in the City of Seattle, in the State of Washington, on Monday, the eleventh day of September, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2015.

SOLOMON RIPINSKY,

Appellant,

vs.

G. W. HINCHMAN et al.,

Appellees.

**Order Granting Motion That Evidence in Printed
Record in Case No. 1782 Need not be Printed
Again Herein, etc.**

On consideration of the motion of counsel for the appellant, filed September 6, 1911, and presented by Mr. Charles T. Hutson, on behalf of counsel for the appellant, for an order approving the stipulation of counsel that certain evidence be not again printed herein, etc., and on consideration of the said stipulation,

It is ORDERED that the said motion be, and hereby is granted, and, pursuant to the said stipulation, it is ORDERED that the evidence contained in the

printed transcript of record in case No. 1782 in this Court, entitled Solomon Ripinsky, appellant, vs. G. W. Hinchman et al., appellees, which evidence was read in evidence on the second trial of the case in the court below and certified to this Court on the present appeal, need not be again printed, but that the printed transcript of record in said case No. 1782 may be used on the hearing of the present appeal with the same effect as if the evidence therein contained had been again printed in the record in the present case, and it is **FURTHER ORDERED** that in any appeal that the appellees G. W. Hinchman et al. may take they will not be required to print said record but may likewise use the record in said case No. 1782.

In the United States

Circuit Court of Appeals

For the Ninth Circuit

SOLOMON RIPINSKI,

Appellant,

vs.

G. W. HINCHMAN, et al,

Appellees.

NO. 2015.

Petition of Appellant for a Rehearing

J. H. COBB,

Attorney for Appellant.

FILED

In the United States

Circuit Court of Appeals

For the Ninth Circuit

SOLOMON RIPINSKI,	}	NO. 2015.
Appellant,		
vs.		
C. W. HINCHMAN, et al,		
Appellees.		

Petition of Appellant for a Rehearing

J. H. COBB,
Attorney for Appellant.

PETITION FOR REHEARING

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The importance of the questions involved in this case, and decided by the Court, and the fact, as it seems to us, that this Court in making the decision herein on January 13th, 1913, overlooked certain undisputed facts in the record which should have controlled the decision, appear to us to warrant us in asking a rehearing. We are fully aware of the great labor which the litigation in this Circuit imposes upon your Honors, but we also know that that labor, great as it is, will not be weighed against the importance of having every case decided rightly upon established principles which are to serve as precedents to guide the lawyer in advice to clients, and the decisions of the courts in future controversies.

For these reasons we earnestly beg your Honors for a rehearing of this cause upon the following grounds, to-wit:

First: The court erred in holding that there was not a fatal misjoinder of plaintiffs, and causes of action.

On the former appeal this court held that there was a misjoinder of causes, (181 Fed. 786) following

the decision in *Utterback vs. Meeker*, 47 Pac. 428, and authorities there cited. In the able and exhaustive opinion then filed, it is pointed out:

“The evidence of plaintiffs tends to show so far as it is necessary to allude to it, that Harry Fay and five or six others went to Haines some time in December, 1897, and that they located upon certain lots or parcels of land within the limits of the town-site of Haines as subsequently surveyed; that still others made like locations later, extending down to the time of the institution of this suit, and even thereafter; that some of these locators went into possession and made improvements, and in a few instances they have continued to live upon such premises to the present time, utilizing the same for business or dwelling purposes. In many instances the possession has passed to others, either through mere delivery, or by bill of sale or deed, and the successors, either immediate or remote, now occupy the premises. In other cases, parties are in occupancy where no previous location has been made, perhaps claiming by right of mere possession, or under some bill of sale or deed from some alleged prior occupant. In still others, locations have been made for the purpose of trade and manufacture, the location notices asserting that the lands specified ‘contains neither coal nor the precious metals nor any town-site nor any land to which the natives of Alaska have prior rights.’ There are thirty-four parties plaintiff to the suit, and to illustrate the style of holdings relied upon as a basis for the cause of suit, it will be in-

structive to trace the titles of some of the plaintiffs, which are exhibited by the proofs and the records. In order to prevent confusion—the lots as numbered on the Fogelstrom plat begin on the east side and run west, for the south tier of each block from 1 to 6, and for the north tier from 7 to 12. The map to which reference is had here is one compiled by Elias Ruud. It is offered in evidence a ‘Plaintiffs’ Exhibit No. 2,’ and may be termed the Fogelstrom map. The lots shown on Plaintiffs’ Exhibit No. 1, for the south tier in general are numbered from east to west, running from 1 to 6, and for the north tier from west to east, running from 7 to 12. The exceptions to this numbering are blocks 1 and 2. As to block 1 the south tier is numbered irregularly, beginning at the east and running from 1 to 11, and the north tier regularly, beginning at the west and running from 12 to 17. As to block 2, the south tier again is numbered irregularly from east to west, the numbers running from 1 to 8, and the north tier regularly from west to east, running from 9 to 14. The locations and transfers presumably are according to the Fogelstrom or Ruud map or plat, Plaintiffs’ Exhibit No. 2. H. Fay is a party plaintiff. He claims parcel 4, block 1, of the town of Haines. This included portions of lots 3 and 4 as designated on the Fogelstrom map. A location notice is offered, Harry Fay as locator, whereby he located and claimed for residence and business purposes lots 3 and 4, situated in the town of Haines, as shown on the survey and plat of said town, made by Walter Fogelstrom,

civil engineer. This notice bears date December 14, 1897. There is manifestly some mistake as to the date, for the Fogelstrom plat was concededly not made until a later date, and a location could not then have been made as shown on the survey and plat because it was not then in existence. But, be that as it may, Fay testifies that he had been the owner in possession of Lot 4, Block 1 ever since, occupying it for business and dwelling purposes. This alludes to lot 4, Exhibit 1. In derogation of his title, however, a deed is an evidence showing that Fay and wife conveyed the east half of lot 4, Fogelstrom map, to James Fay October 2, 1903. Thus stands Harry Fay's title and right to possession. G. W. Hinchman, also a party plaintiff, claims to be the owner and in possession of lots 7 and 8, block 3, Exhibit 1, which corresponds with lots 11 and 12, Fogelstrom plat. Hinchman testifies that lots 7 and 8 are his lots; that he has occupied them since the fall of 1903; that he bought lot 8 from M. W. Bane and the other from Bjornstad, and then describes improvements. The record shows deed from M. W. Lane to George W. Hinchman to lot 11, Fogelstrom map, of date October 8, 1903, and deed from M. W. Lane to Carl Bjornstad to lot 12, of date July 5, 1907. It does not appear that any location was ever made of these lots by any one. Thomas Vogel claims lot 1, block 2, Exhibit 1, which corresponds in a measure with lots 1 and 2, Fogelstrom map. He testifies, under the name of Tim Vogel, that he is the owner of part of lot 1 and 45 feet of lot 2. He says he did not locate but bought

from E. L. Wilson. The record shows that location was made of lot 1 by Daniel Morris January 26, 1898, and of lot 2 by A. Blonde February 12, 1898. There are no conveyances from either Morris or Blonde. Vogel conveyed to W. H. Spencer, March 13, 1903, a parcel lying in the northeast corner of lot 1, being 50 feet east and west by 20 feet north and south. Spencer and wife conveyed to Tom Valeur of date July 19, 1904, a parcel 40 feet in width off the north end of lots 1 and 2. There are no conveyances other than these. S. J. Weitzman claims lot 3, block 1, and R. L. Weitzman, his wife, lots 12 and 13 of the same block, according to Exhibit 1. These lots cover parts of 3 and 4 and 11 and 12, Fogelstrom map. Weitzman testified that he located lot 3, and that his wife bought 12 and 13 from Cronen, the original locator. The record shows that Harry Fay located lots 3 and 4, Fogelstrom map, December 14, 1897, and that Harry Fay and wife deeded to James Fay lot 3 and east half of lot 4 October 2, 1903. As to lots 12 and 13, or 11 and 12 Fogelstrom map, the records show no location whatever. E. B. Cronen conveyed these lots, July 6, 1901, to R. L. Weitzman, and on October 30, 1902, R. L. Weitzman and husband conveyed 25 feet off the south end to D. Butterick. W. W. Warne sues for lots 7, 8, 9, 10, and 11 of block 2, Plaintiff's Exhibit 1. These correspond with 5, 6, 10, 11, and 12, Fogelstrom map. As to these lots W. B. Stout testifies that he thinks Reverend Mr. Warne claims them; that Warne is now in North Dakota somewhere, and that he placed some foundations for build-

ings on the lots and built a good fence around them several years ago. The record shows that lots 10, 11, and 12 were located by Adele Bigford December 14, 1898, and that lot 10 was again located September 6, 1906 by Cortes Ford, lot 11 on the same date by Frank Bruskers, and lot 12 by T. Wilder Ford. As it pertains to lots 5 and 6, Fegelstrom plat, there has been neither location nor deed of any sort. Kate Kabler claims to be the owner of lot 1, block 4. As to this parcel the two maps correspond. It is shown that Mrs. Kabler is not in Haines, and that the lot is unoccupied; that it has a house upon it, but no other improvements. The record shows that W. W. Warne located it December 15, 1897, for trade and manufacturing purposes, and that E. Sanderson again located the same lot, under the alleged town-site, January 31, 1898. These instances well illustrate the record testimony respecting the title to the property concerned. In other cases, the alleged owners do not appear to testify to their claims and ownership, but witnesses were called and asked, in a general way, who were the owners of such and such lots, with the answers that several claimants were such owners. Beyond this, Plaintiffs' Exhibit 1 further shows that a number of the lots of the town of Haines, lying in conflict with survey No. 573, are wholly vacant and unoccupied, and in actual fact no one is in possession or claiming any interest therein. So it thus appears that there are all shades of claim of title and possession as it respects the lots of the town, lying in conflict survey No. 573, from

that of the claimant who located his lot and has continued in unbroken possession to the present time, to that of him who has the merest shadow of possession, as well as the vacant lots without a pretense of claim of title. occupation, or possession.”

Further on and answering the contention of the plaintiffs that this was in reality a suit on the part of the citizens of the town of Haines “to remove all the property embraced within the limits of the town, as platted, the cloud cast upon its title by appellants’ Homestead Claim,” as the court says:

“The answer to this contention is, that the suit was not so instituted. But if it had been, the case would be no different, as the basis thereof must needs be the claim and title of the individuals, not of the town. Indeed, the town can make no claim of title to any of the lots and blocks within its borders, especially an unincorporated town, which practically had no borders. The rule that a court of equity will interpose its jurisdiction to avoid a multiplicity of suits ‘where a number of persons have separate and individual claims and rights of action against the same party A., but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone’ (1 Pom. Eq. Jur., Sec. 245), is sought to be invoked, but we do not deem it applica-

ble, for the reason that the plaintiffs' claims do not all arise from the same common cause, neither are they governed by the same legal rule, nor do they involve similar facts. One of the plaintiffs, possibly two or three, is claiming as an original locator within the alleged townsite, having continued in unbroken possession to the present time, and being now in possession. Others show title simply by exhibiting a deed or deeds from someone else, without even depending upon any location under the townsite, or tracing their holdings or possessions thereto. Others show mere possession, without else, and yet others show location for trade and manufacturing purposes, discarding the townsite, with an attempt to trace title and possession to such location. It is thus very apparent that the titles of the several plaintiffs, being held in severalty, are not of the same or similar kind or description, and the rule specified does not meet the case."

The case was reversed and remanded with instructions to dismiss the plaintiffs' bill.

Appellants Hinchman et al, thereupon filed a motion for a rehearing and attached to it a copy of the original complaint filed in the court below. This original complaint had attached to it, as an exhibit the adverse claim filed by the plaintiffs in the land office, and sets up a *joint* ownership and possession on the part of the plaintiffs of all the ground embraced in the defendants' homestead survey, (excepting a certain small portion.) The motion for re-

hearing was denied, *but without giving the defendant, Ripinsky, a further opportunity to be heard thereon*, the court modified the former decree, directing a dismissal of the bill, to the extent of directing in the court below "such other proceedings as to that court may seem proper." This court further said as to the original complaint, "That for all the purposes of prosecuting an action for the quieting of title as adverse claimants, under the statute the complaint appears to be sufficient." (186 Fed. 152.)

Upon the coming down of the mandate of this court, however, the plaintiffs did not go to trial upon the original complaint, which they had exhibited to this court in their motion for a rehearing, because that complaint as to the allegation of joint ownership and possession was untrue, and could not be sustained by a scintilla of proof. Plaintiff's therefore filed a Third amended complaint, which, in so far as the several ownership of plaintiffs is concerned is identical with the second amended complaint, which this court had held bad in the opinion reported in 181 Fed. 786. The only difference between the two complaints (the second, and the third amended,) is that the last alleged, and had attached to it the adverse claim filed in the land office.

On the second trial the evidence as to the ownership and possession of plaintiffs, was identical with the evidence on the first trial, which this court analyzed in the quotation above made. And from the additional evidence introduced on the second trial solely on the question of citizenship, the court might

have added, that it now appeared that some of the plaintiffs were admittedly aliens, some failed to prove citizenship, and some were citizens.

The question is then squarely presented whether in an adverse suit under the Alaska Statute, the ordinary and universally recognized rules of pleading governing joinder of plaintiffs and causes of action, is in any manner abrogated or changed.

On the second appeal in reaching the conclusion that there was no misjoinder, this court said:

“The question is again presented here, as it was on the first appeal, whether the plaintiffs were entitled to join in a bill of complaint in aid of the contest against the issuance of a patent to the defendant under his homestead application therefor. *Ripinski v. Hinchman*, 181 Fed. 786. As the cause was then presented, which was in the way of an ordinary suit to quiet title, it was held that such joinder was not permissible. The cause now comes here in a very different aspect. The complaint shows a cause in aid of the complainant’s contest in the land office against the claim of *Ripinski* for a homestead patent.

“It is undoubtedly proper and regular under the statute for the settlers and occupants to petition the Secretary of the Interior to name a trustee to enter the lands so occupied for townsite purposes, who, when so named, would become the trustee or trustees for all, and thereafter administer the trust for all. There exists no good reason why they should not also join in a suit for contest against the issuance of a

patent prior to the time when a trustee or trustees may be named by the Secretary of the Interior for making such entry for townsite purposes. After the trustees are named and entry made, then the trustees would very properly represent the settlers and occupants. *Ashby v. Hall*, 119 U. S. 526; *Martin v. Hoff*, 64 Pac. 445. We think, in the present state of record, it was appropriate for the alleged settlers and occupants to join in the bill of complaint for the particular relief sought."

Neither of the cases cited, it seems to us, have any bearing upon the question of joinder; certainly they are not decisive of it. *Ashby v. Hall* was simply a suit between a town lot owner claiming the right to an alley adjoining his lot, against another to whom the townsite trustee had deeded such alley. The whole case turned upon the question of the powers of the trustee to make conveyance of the streets or alleys of the town. *Martin v. Hoff* was an action for a mandamus brought by one claiming a right to a lot in an entered townsite, to compel the trustee to convey in accordance with the law. In neither case was there any question of joinder raised. It may be true, however, that "After the trustees are named and entry made, then the trustees would very properly represent the settlers and occupants." For the trustees would then be clothed with the entire legal title, and could sue and be sued as any other owner. But we most respectfully but earnestly submit, that before there is any trustee, *or it is even determined that there ever will be a trustee, parties claiming in*

severalty, some as townsite locators, some as locators for trade and manufacture, some as mere squatters, some in possession and some out of possession, CANNOT unite in one suit to quiet title, not only as to what ground they claim, but also as to large portions of the survey they neither possess, occupy or claim. In any event the supposed trustee could only represent the townsite claimants, but not the claimants under the trade and manufacturing act; nor could such trustee in any event, represent the alien plaintiffs. Yet here the court has in effect affirmed a decree in favor of plaintiffs claiming under these diverse laws a number, if not the majority of whom are aliens, and cannot acquire title to the public lands.

It is true that by the statute the *controversy* is referred to the courts in aid of the land department. *But no new jurisdiction is conferred upon the courts, nor is any new procedure provided.* Such suits must be brought and prosecuted subject to the same rules of pleading and practice that govern in other cases. Speaking of the law providing for adverse suits in contests over mining claims, which as your Honors have truly said, is the prototype of the Alaska Statute, the Supreme Court of Nevada said: "The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the State courts of competent jurisdiction, and institute such *proceedings as they might under the different forms of action, therein allowed, elect*; and there try the rights of possession

to such claim and have the question determined. The Acts of Congress do not attempt to confer any jurisdiction not already possessed by the State courts; *nor to prescribe a different form of action.* If the parties protesting are in possession of the ground in dispute, they can bring their action under Sec 256 of the Civil Practice Act, (Stats. 1869, 239), or, if they have been ousted from the possession, they could bring their action of ejectment; and in either action 'the rights of possession' to such claim could be finally settled and determined. *We are of opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes that apply to such actions in our State courts, irrespective of the acts of Congress."* (Italics ours.) 420 Min. Co. v. Bullion Min. Co., 9 Nev. 248.

The opinion in this case is by Judge Hawley, whose wide experience in mining litigation certainly entitle his views to great weight. See also *Iba v. Central Assn'* 42 Pac. 20.

The statute under consideration by the courts in rendering these decisions is the prototype of the Alaska Statute under which this suit was brought. Should it not then receive the same interpretation? If it should be so interpreted, then surely upon a further consideration, your Honors will not hold that the law permits a joinder of parties and causes of action in a suit under the statute that would not be tolerated in an ordinary suit to quiet title. Nor is this a mere technical objection. *The plaintiffs have*

all succeeded in obtaining practically all the relief sought. Yet it is perfectly obvious that if they had been compelled to sue separately, those whose claims post date the institution of this suit; those whose claims post date the official survey of defendant's homestead; those whose claims post date the record of the defendant's homestead notice; and those who were out of possession; and the alien plaintiffs, could not have succeeded under any possible theory of the case. Nor could any one singly have defeated the defendant to any part of the land he did not claim. Yet by the ruling complained of, and which we are now asking the Court to reconsider upon a rehearing, all these things have happened.

Second.

The evidence on the second trial was identical with that on the first, except that the plaintiffs offered in evidence a letter from the Commissioner of the General Land Office dated July 17th, 1905, from which it appeared that "George Vogel and 57 other settlers at Haines petitioned for a survey of the boundaries of the townsite, which petition had been favorably considered" &c. From this letter the Court concludes that "plaintiffs had proceeded as far as they could in the Land Office when the contest was brought on." In so holding this court must have overlooked the fact that George Vogel is not a party to this suit; nor is there the slightest evidence that any one of the other 57 petitioners are parties to this suit. Neither is there any evidence that the ground

sought to be surveyed embraced the Ripinski homestead. The petition, so far as the record shows, may have been suspended because of the proximity of the homestead survey, and the law which prohibits surveys in Alaska nearer than 80 rods where they abut upon the tide water. This whole matter was, so far as the record shows, one with which neither party to the suit had the slightest connection. Yet the court has used it as a basis for the conclusion that the plaintiffs had proceeded as far as they could in the Land Office.

Third.

The first trial and the decree then entered was set aside by this court, and a new trial, in effect, ordered. On the second trial the whole case was made, by the learned Trial Judge, to turn upon the proposition that the findings of the court on the first trial, where not expressly set aside by the Appellate Court were the "law of the case" and binding upon the Trial Court on the second trial. The Trial Court then held that it had nothing to do but marshal the findings of this court, and of the Trial Court into a decree. (Rec. 2015, pp. 76, 77.) The Trial Court, in effect, refused to pass upon any question, except that of the citizenship of the plaintiffs, all of whom he found to be citizens, *except six*. (Rec. 2015, p. 25.) In this condition of the record the case was brought into this court, and except the question of misjoinder, none of the points raised in the court below, and assigned as error, appear to have been

specifically considered or passed upon here; but the court has taken the record, and entered a decree thereon substantially as a Trial Court. In doing this we feel that many points which should have been more fully discussed at the bar, and in the briefs, have been overlooked. It was assumed that the court would consider the brief for the appellant, Ripinski, filed in Cause No. 1782, especially upon the facts. The court has found in effect, that the plaintiffs obtained prior possession of the ground in controversy after the purchase by Ripinski in December 2, 1897. (The question of the possession of the Dickinsons will be dealt with later.)

The loose, general statements of the plaintiffs, testifying in their own behalf, tend to sustain this conclusion. But we believe a fair and full consideration and analysis of this testimony will convince the court that this conclusion is not warranted.

And first as to the possession of Ripinski from and after Dec. 2, 1897.

Ripinski undoubtedly purchased from Mrs. Dickinson whatever property she had on Dec. 2, 1897. He undoubtedly intended to purchase and take fifteen acres; he undoubtedly moved into the buildings that had theretofore for many years been occupied by the Dickinsons. At that time there was no law in Alaska providing for the filing and recording of a homestead claim. The act was passed in March, 1903, and in June, 1903, he filed his notice of homestead claim. (Rec. 1782, p. 771.) An amended notice was filed in Dec., 1903. (Rec. 1782,

p. 776.) Now we think it must be conceded that if the plaintiffs, and those under whom they claim, had not acquired any possessory rights prior to these acts by Ripinski, then Ripinski had the better right. To defeat this claim it was incumbent upon the plaintiffs to show a right of possession to the particular parcel, or parcels, claimed by them respectively in the complaint. Now the facts are that except

J. G. Morrison, claiming part of parcel 1, Block 1,
 S. J. Weitzman, claiming parcel 3, Block 1,
 D. Butrich, claiming part of parcel 11, Block 1,
 E. A. Adams, claiming parcel 14, Block 1,
 J. G. Morrison, claiming parcel 16, Block 1,
 G. C. DeHaven and T. Creedon, claiming parcel 17, Block 1,

Thomas or Tim Vogel, claiming parcel 1, Block 2,
 Mary V. McIntosh, claiming parcel 1, Block 3,
 E. J. Berger, claiming parcel 4, Block 3,
 Karen Bjornstad, claiming parcel 5, Block 3, and
 Kate Kabler, claiming parcel, Block 4,

not a single one of the plaintiffs showed possession or claim either in themselves or in their grantors to any one of the parcels sued for by them, respectively, antedating June 23rd, 1903.

The evidence upon the various cases made for the plaintiffs is all collected, and the record cited in our brief filed in cause No. 1782, pages 38 to 69 inclusive, and we ask the court to consider the same as a part of this petition without requiring it to be again printed herein. By far the greater number of those persons who did locate during the speculative period

of 1898, abandoned their locations and moved away. And of the plaintiffs named above, the evidence as to the date of the possession of most of them is very doubtful. And of those named D. Butrich, and E. J. Berger are aliens, (Rec. 2015, p. 25), and the citizenship of the others is doubtful. (Rec. 2015, pp. 58-75.)

Third.

The court declined to consider that Sarah Dickinson had any possessory right to any part of the 15 acres she sold Ripinski in Dec. 1897, excepting the portion of the tract that was fenced, and as to the rest held that "The real controversy hinges about the question of prior possession as between the parties litigant"; and we most respectfully ask the court to reconsider this holding, and whether the correct legal conclusion has been drawn from the facts *found by this court*.

These facts as stated by the court in the opinion rendered, are as follows:

"In 1878 George Dickinson, at the time married to an Indian woman named Sarah, being the representative of the Northwest Trading Company, established a trading post at Portage Cove, now known as Haines. He located a tract of land for trading purposes, and erected the buildings now occupied by the defendant. At Dickinson's request, an officer of the United States Steamship Jamestown surveyed the tract so located, and set the corner

posts. It is in evidence that Dickinson constructed an inclosure around the tract, consisting partly of brush and rails on the south line, and the balance of single galvanized wire. The lines were also blazed, as they ran mostly through the timber, and a small portion of the ground was cleared and used for garden purposes. In 1880 Dickinson succeeded to the interest of the Trading Company, and continued to occupy the buildings until his death in 1888. He left surviving him his wife Sarah Dickinson, and a son and daughter, William and Sarah. The widow and son and daughter continued to occupy the buildings and to carry on the business until December, 1897."

On Dec. 2, 1897, Mrs. Dickinson sold and conveyed to Ripinski.

Upon these facts should not your Honors have held that the claim of Sarah Dickinson was protected under the proviso of section 8, of the Act of May 17th of that year, which was specially plead by the defendant? If Dickinson had the tract surveyed, enclosed, corner posts set, and "continued to occupy" the buildings on the property from 1880 to his death in 1888, then he was on the property in 1884 when the Act of May 17th went into effect; *and there is no claim of an abandonment either in the pleadings or the evidence.*

The proviso in the 8th section of the Act of May 17th, 1884, reads as follows: That the Indians or other persons in said district shall not be disturbed in the possession of any lands now actually in their use or occupation, or now claimed by them, but the

terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

By this legislation Congress manifestly intended to accomplish two things—to protect existing rights, and maintain them in *statu quo*, and to promise the ultimate title. It has been repeatedly construed by the Courts of Alaska, by this Court, and by the Land Department. For almost a quarter of a century (from 1867 to 1893) it was the only title by which non-mineral land could be held in Alaska.

Carroll v. Price, 81 Fed. 137.

Malony v. Adsit, 175 U. S. 281.

Heckman v. Sutter, 128 Fed. 393.

(And in this connection see pages 38-40 of our brief on file herein.)

In *Heckman v. Sutter*, this court says that Congress "saw proper to protect the existing possession" &c. What then is meant by the words "possession," "use," "occupancy," and "now claimed," as found in this proviso? Judge Delaney held it, *Carroll v. Price*, to not only protect these in the actual possession or occupancy, but those who had "a bona fide claim to a piece or tract of public land in the District." The authority of that decision, so far as we known, has never been questioned by any court. It has been cited with approval by the Supreme Court, and by this court, and it has certainly been regarded as a leading case by the District Courts in Alaska. It is not necessary, however, to claim all that might be

claimed under the authority of *Carroll v. Price*, if it be conceded that Congress used the words "possession," "use," and "occupancy," in the ordinary sense universally recognized by the courts. The denial of any right under the statute in *Mrs. Dickinson*, at the time of her conveyance to *Ripinski* appears to be predicated upon the fact that the enclosure erected by *Dickinson* had fallen down and disappeared, and that no use had ever been made of that portion of the tract outside buildings and garden plot. But "Nothing can be more clear than that a fence is not indispensable to constitute possession of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts which are equally evincive of such an intention of asserting such ownership and possession; such as entering upon land and making improvements thereon, raising a crop of corn, felling and selling trees thereon &c, under color of title.

"An entry into possession of a tract of land under a deed containing specific metes and bounds gives a constructive possession of the whole tract, if not in any adverse possession; although there may be no fence or inclosure round the ambit of the tract."

Elliott v. Pearl, 10 Pet. at page 442.

So with occupancy. The Supreme Court of Michigan said: "Occupancy within the meaning of

How. Ann., St. sec. 8503, which provides that, if distinct lots be occupied as one parcel, they may be sold together on foreclosure sale, does not require that all the lands be improved. The actual inclosure of a part carries with it the occupancy of a balance which is used, or intended to be used as part of one farm."

Harris v. Creveling, 80 Mich. 249.

But Congress was not dealing with farms, or with lands which were described in deeds. It was dealing with the public domain in Alaska, and protecting *Indians* and other persons. Now *Indians* are not supposed to be given to fence-building. Alaska was not a stock-raising or agricultural country. And it could hardly be supposed that it meant that if an *Indian* or other person desired the benefit of the Act he must enclose, or cultivate *all* the tract to which he laid claim. It could hardly be supposed that if a tract of sixteen acres was surveyed, corner posts set, the lines blazed, and part of this tract cultivated and built upon, that the possession and occupancy would not be held to extend to the entire tract, or that possession and occupancy would be lost simply because the fence was suffered to fall down. Under the meaning of the words as recognized by the courts, we think that under the facts found by this court, the Dickinsons were in possession and occupancy of the entire tract at the time they sold to Ripinski.

But Congress, as if out of abundant caution,

added yet another term to the rights it was protecting. Not only did it protect lands in the use and occupancy of the Indians or other persons, but it protected lands "*Now claimed by them.*" It may be readily conceded that by this clause Congress did not mean to protect every mere assertion of a right to land. But it must also be conceded that Congress did intend that the clause should add something to the words that had preceded it—it was not intended to be meaningless. Did Congress not mean then just what the Alaska courts have always held that it meant, viz: that if one in Alaska had laid a bona fide claim to a tract or parcel of the public domain, and evinced an intention so to by acts which demarked his claim and set it apart from the rest of the public domain, then he was within the protection of the law?

Now Dickinson settled and built his home upon this little tract of sixteen acres; he had it surveyed; he set his corner posts; blazed his lines, and he cultivated a portion of it. What if after his death the fences fell down, and his widow neglected or was unable to put them up? Would that destroy the bona fides of the claim, or take it out of the protection of the statute? She was living there ready, presumably to show her boundaries to all who were interested. On Dec. 2nd, 1897, she sold and conveyed to Ripinski, by deed, calling for the "Dickinson property" to which was attached a plat showing the extent and boundaries of the tract. (Rec. 1782, p. 782.) Ripinski moved in and took possession under

this deed, ten days before Fay and his associates showed up. Surely then, *under the facts found by this court, this 16-acre tract was "used," "occupied," and "claimed" by Ripinski and his grantor, and certainly his possession was "disturbed,"* within the meaning of the statute the protection of which he specially invoked in his pleadings.

We ask the court then for a rehearing upon the question, whether under the undisputed facts, Sarah Dickinson did not have a possessory right which she could and did sell to Ripinski; and whether when Ripinski went into possession under his deed on Dec. 2, 1897, of the buildings and improvements on the tract, he was not in possession of the whole tract described in the deed, viz: the tract "known as the Dickinson Property" and shown in the plat attached to the deed.

Fourth.

The decree as finally ordered by this court, is contrary to and not sustained by the pleadings in this:

Plaintiffs in their Third Amended Complaint set fourth claims to only a portion of Survey 573, while Ripinski in his answer claims the entire survey. The following parts of the survey are not claimed by any one of the plaintiffs:

Block 1, parcels 12 and 13. (These parcels in the complaint are alleged to belong to R. L. Weitzman, but R. L. Weitzman is not a party to the suit.)

Block 4, parcel 2.

Block 5, parcels 8, 9, 10, 11, and 12.

Block 6, parcels 1, 3, and 4.

This point was insisted upon on the first trial, and assigned as error, but not decided on the first appeal. On the second trial the lower court refused to pass upon anything except to marshal the findings made by the Trial Court on the first trial, where not expressly set aside by this court and the findings of this court, as gathered from the opinion, into findings upon which to base the decree. (Rec. 2015, p. 77.) Your Honors must have overlooked the fact that in addition the part of the survey awarded Ripinski, there was an additional part not claimed by any party to the suit except him, but which by the decision rendered is practically awarded to the plaintiffs.

Fifth.

The matter of costs is of some importance in this case, and in decreeing that defendant pay all costs of both trials, the court has apparently contradicted itself, or at least fallen into an inconsistency. On page 5 of the opinion rendered your Honors, speaking of the statute under which this suit was brought, say:

“The statute has its prototype in the statutes providing for the acquisition of mineral lands. Section 2326, Revised Statutes, provides for an action

of the kind in case of contest between for the same tract of mineral land. This section was amended March 3rd, 1881, (21 Stat. 505), so that if any action brought in pursuance thereof the title to the ground in controversy be not established by either party, the costs shall not be allowed to either party. While there is no such amendment or provision with respect to the statute under which this suit was instituted, yet it would seem to the reasonable course under like conditions."

The court then finds that plaintiffs have not established their right to a patent; that defendant has a right to a patent only to that part of his survey not in controversy; and adjudges the costs of both trials to the plaintiff's. It is no doubt only necessary to call the attention of the court to this matter for a correction to be made.

But in view of the importance of the question at issue, not only to the parties, but to the jurisdiction of Alaska, and especially in view of the singular turn the case took on the second trial in the court below, we are persuaded the ends of justice would be subserved by granting a rehearing, and allowing a full argument upon the controlling points in the case.

Respectfully submitted,

J. H. COBE.

Attorney for Solomon Ripinski,
Appellant and Defendant.

I, J. H. Cobb, counsel for Solomon Ripinski, Appellant, do hereby certify that in my opinion the foregoing petition is well founded and is not interposed for delay.

.....*J. H. Cobb*.....
Counsel S. Ripinski, Appellant.

No. 2016

United States
Circuit Court of Appeals
For the Ninth Circuit.

EMERY VALENTINE,

Plaintiff in Error,

vs.

J. J. McGRATH and S. HIRSCH,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for
the District of Alaska, Division No. 1.

FILED

OCT 28 1911

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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EMERY VALENTINE,

Plaintiff in Error,

vs.

J. J. McGRATH et al.,

Defendants in Error.

Praeipice for Printing the Record.

To the Clerk of the U. S. Circuit Court of Appeals
for the Ninth Circuit:

The plaintiff in error will rely in the Appellate Court upon the following errors assigned, to wit:

1st. The Court erred in not awarding to the plaintiff, Emery Valentine, that portion of Lot No. 1, in Block G, of the town of Juneau, described in the third cause of action in the complaint, and in the second amended answer of the defendant McGrath.

2d. The Court erred in not awarding to the plaintiff, Emery Valentine, that portion of Lot No. 1, in Block No. 3, of the town of Juneau, described in the first cause of action in the complaint; and further erred in awarding the same to the defendant McGrath, conditioned upon his paying any judgment that might be recovered against him for the value of said premises, together with damages for withholding the same, in any suit that said Valentine might bring within sixty days against the said McGrath.

3d. The Court erred in not awarding to the plaintiff, Emery Valentine, the sum of \$10.00 per month from May 1st, 1901, to the date of trial, as rentals on the property in controversy.

4th. The Court erred in adjudging that each party pay their own costs, and in not adjudging that

plaintiff recover costs of the defendants.

And the following portions of the record are not material to a consideration and determination of the errors so assigned, and no bearing whatever upon any of the questions to be argued thereunder, and you will therefore omit the same in printing the record, to wit:

1st. All captions and titles of cause and paper, after the complaint, but including in the printed record the full endorsements on such papers.

2d. The following portions of the bill of exceptions, to wit:

Omit from and inclusive of page 67 to and inclusive of page 80.

Print from and inclusive of page 81 to and inclusive of page 88.

Omit from and inclusive of page 89 to and inclusive of page 339.

J. H. COBB,

Attorney for Plaintiff in Error.

Service of the above and foregoing Preacipe for printing the record is admitted this Aug. 7th, 1911.

LEWIS P. SHACKLEFORD,

Attorney for Defendants in Error.

[Endorsed]: No. 2016. In The United States Circuit Court of Appeals for the Ninth Circuit. Emery Valentine, Plaintiff in Error, vs. J. J. McGrath et al., Defendants in Error. Preacipe for Printing Transcript. Filed Aug. 19, 1911. F. D. Monckton, Clerk.

*In the District Court for Alaska, Division No. 1,
at Juneau.*

#613.

EMERY VALENTINE,

Plaintiff,

vs.

J. J. McGRATH and S. HIRSCH,

Defendants.

Complaint.

The above-named plaintiff, complaining of the above-named defendants, for cause of action alleges:

I.

That plaintiff is the owner in fee simple of lot No. 1, in Block 3 of the town of Juneau, Alaska, according to the official plat of said town, and is entitled to the possession thereof.

II.

That heretofore, to wit, on or about the 1st day of May, 1901, the defendants wrongfully entered upon a portion of said lot and ejected plaintiff therefrom and have ever since and do now withhold from plaintiff the possession thereof. That the portion of said lot so entered upon by the defendants is described as follows:

Beginning at the Southeasterly corner of said lot identical with the Southwesterly corner of Lot No. 2 in same block; thence North 44° West 3.3 feet; thence South 3.3 feet to a point on the South boundary line of said Lot No. 1 1.5 feet distant from the Southeasterly corner of the same; thence along the South-

erly boundary line of said lot to the place of beginning.

III.

That the rental value of said premises is the sum of \$1.00 per month and plaintiff has been damaged by reason of the premises in the sum of \$72.00. [1*]

And for a second and further cause of action against the defendants, plaintiff alleges:

I.

That plaintiff is the owner in fee simple and entitled to the possession of lots Nos. 2 and 3 in Block No. 3, in the town of Juneau, Alaska, according to the official plat thereof, and is entitled to the possession of said lots.

II.

That heretofore, to wit, on or about the 1st day of May, 1901, the defendants with force and arms entered upon a portion of said lots and ejected the plaintiff therefrom and have ever since and do now withhold from the plaintiff the possession thereof. That the portion of said lots so entered upon and withhold by defendants is described as follows:

First: Beginning at a point on the common boundary line between said Lots 2 and 3, 11.1 feet from the Northeast corner of Lot No. 2 and the Northwest corner of Lot No. 3; thence North $59^{\circ} 9'$ East 10 feet more or less to the corner of the building occupied by defendants; thence South $30^{\circ} 31'$ East 24.2 feet to the Southeasterly corner of said building; thence South $59^{\circ} 9'$ West 2.4 feet to the intersection of the common boundary line between said Lots 2 and 3; thence

*Page number appearing at foot of page of original certified Record.

North 44° West along said boundary line 23.5 feet; thence South $59^{\circ} 8'$ West 17.1 feet; thence South $29^{\circ} 8'$ East 23.3 feet; thence North $30^{\circ} 51'$ West 24.2 feet to the corner of the building occupied by defendants; thence North $59^{\circ} 9'$ East to the place of beginning.

Second: Beginning at a point on the common boundary line between said Lots 2 and 3, 29.6 feet distant from the Southwest corner of Lot No. 3 and the Southeast corner of Lot No. 2; thence South $70^{\circ} 6'$ East 3.8 feet; thence north $40^{\circ} 6'$ East 3.3 feet; [2] thence South $19^{\circ} 54'$ West 5.2 feet to the common boundary line between said Lots 2 and 3; thence South 44° West along said common boundary line to the point of beginning.

Third: That the premises so withheld by the defendants from plaintiff are of the reasonable value of \$15.00 per month and plaintiff has been damaged by defendants by reason of the premises in the sum of \$1080.00.

And for a third cause of action plaintiff alleges:

I.

Plaintiff is the owner in fee simple and is entitled to the possession of that portion of Lot No. 1, in Block G, in the town of Juneau, Alaska, according to the official plat thereof, described as follows:

Beginning at a point on the common boundary line between Lot No. 1, in Block No. 3, and Block G about 2 feet distant Westerly from the Southeast corner of said Lot No. 1; thence Southeasterly 33.7 feet to a point on the South boundary line of said Block G 51.8 feet Easterly from the West corner of said Block G; thence along the common boundary line be-

tween said Lot No. 1, in Block 3, and Block G to the point of beginning.

II.

That heretofore, to wit, on or about the 1st day of May, 1901, the defendants with force and arms entered upon a portion of the above-described premises and ejected the plaintiff therefrom and ever since have and do now withhold from him the possession thereof. That the portion of said premises so entered upon by defendant is described as follows:

Beginning at a point on the initial line above described where the front wall of the building now occupied by defendants intersects the same about 10 feet distant from the South end of said [3] line; thence South $83^{\circ} 4'$ West 2 feet; thence North $15^{\circ} 54'$ East 2 feet; thence at right angles to the last course about $11\frac{1}{2}$ feet to the intersection of the initial line to the point of beginning.

III.

That the rental value of the premises so withheld by defendants is the sum of \$1.00 per month and plaintiff has been damaged by reason of the premises in the sum of \$72.00.

Wherefore, plaintiff sues and prays judgment for the restitution of said premises and for judgment for the sum of \$1500 and costs of suit, and for general relief.

MALONY & COBB,

Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

Emery Valentine, being first duly sworn, deposes

and says: I am the plaintiff above named. I have read the above and foregoing complaint and the same is true as I verily believe.

EMERY VALENTINE.

Subscribed and sworn to before me, this 26th day of April, 1907.

[Notarial Seal]

L. CHAPIN,

Notary Public for Alaska.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath and S. Hirsch, Defendants. Complaint. Filed Apr. 26, 1907. C. C. Page, Clerk. By E. W. Pettit, Asst. Malony & Cobb, Attorneys for Plaintiff. Office, Juneau, Alaska. [4]

[Title of Court and Cause.]

Answer of S. Hirsch.

Comes now the defendant S. Hirsch, and for answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Referring to paragraph one (1) of plaintiff's complaint, this defendant has no knowledge or information sufficient upon which to found a belief as to the matters and things therein stated and therefore denies the same.

II.

Referring to paragraph two (2) of said plaintiff's complaint, this defendant denies each and every allegation therein contained.

III.

Referring to paragraph three (3) of said complaint this defendant has no knowledge or information sufficient upon which to found a belief and therefore denies each and every allegation therein contained.

IV.

Referring to paragraph one (1) of plaintiff's second and further cause of action, this defendant has no knowledge or information [5] sufficient upon which to found a belief as to the matters and things therein stated and therefore denies each and every allegation therein contained.

V.

Referring to paragraph two (2) of second and further cause of action, this defendant denies each and every allegation therein contained excepting the third subparagraph thereof and this defendant has no knowledge or information sufficient upon which to found a belief as to the matters and things therein stated and therefore denies each and every allegation therein contained.

VI.

Referring to paragraph one (1) of the third cause of action of said complaint, this defendant has no knowledge or information sufficient upon which to found a belief as to the matters and things therein stated and therefore denies each and every allegation therein contained.

VII.

Referring to paragraph two (2) of said third cause of action of said complaint, this defendant denies each and every allegation therein contained.

VIII.

Referring to paragraph three (3) of said third cause of action this defendant has no knowledge or information sufficient upon which to found a belief and therefore denies each and every allegation therein contained.

For a further and separate cause of action and affirmative defense, this defendant alleges that he entered into possession, as lessee, under his codefendant, on the 7th day of [6] March, 1905, of the following described premises, to wit:

Beginning at a point on Front Street, whence the SW. Cor. of Block G bears N. $83^{\circ} 4' W.$ 51.8 ft.; thence N. $17^{\circ} 55' W.$ 92.1 ft.; thence N. $29^{\circ} 9' W.$ 7 ft.; thence N. $30^{\circ} 51' W.$ 24.2 ft.; thence N. $59^{\circ} 9' E.$ 25.6 ft.; thence S. $30^{\circ} 51' E.$ 24.2 ft.; thence S. $50^{\circ} 9' W.$ 2.1 ft.; thence S. $44^{\circ} 00' E.$ 64.6 ft.; thence S. $16^{\circ} 46' E.$ 68.8 ft.; thence N. $83^{\circ} 4' W.$ 53.5 ft. to the place of beginning.

That this defendant entered upon said premises quietly and peaceably and without protest from anyone and that this defendant is now holding, and was at the commencement of this action holding possession of said premises by virtue of a lease executed to him by his codefendant herein on the 7th day of March, 1905.

Wherefore this defendant prays that the complaint herein be dismissed and that this defendant have and recover of and from the plaintiff his costs and disbursements incurred in this action.

LEWIS P. SHACKLEFORD,
Attorneys for Defendant S. Hirsch.

United States of America,
District of Alaska,—ss.

I, S. Hirsch, being first duly sworn, on oath say:
That I am one of the defendants in the above-entitled
action; that I have read the foregoing Answer and
know the contents thereof and believe the same
to be true; that I make this verification because

S. HIRSCH.

Subscribed and sworn to before me this 13th day of
October, A. D. 1907.

[Seal]

T. R. LYONS,

Notary Public for Alaska. [7]

I hereby certify that I served a copy of the fore-
going Answer certified to by Lewis P. Shackelford,
attorney for defendants by leaving said copy in the
office of Malony & Cobb, attorneys for plaintiff on
the 13th day of Dec., 1907, between the hours of 9
o'clock A. M. and 4 o'clock P. M. of said day.

T. R. LYONS.

[Endorsed]: Original. No. 613-A. In the Dis-
trict Court for the District of Alaska, Division No. 1,
at Juneau. Emery Valentine, Plaintiff, vs. J. J. Mc-
Grath & S. Hirsch, Defendants. Answer of S.
Hirsch. Filed Dec. 13, 1907. C. C. Page, Clerk.
By R. E. Robertson, Asst. Shackelford & Lyons, At-
torneys for Defendants. Office: Juneau, Alaska.
[8]

[Title of Court and Cause.]

Second Amended Answer of J. J. McGrath.

Comes now the above-named defendant, J. J. McGrath, and for his second amended answer to plaintiff's complaint herein, shows to this Court:

I.

Answering plaintiff's first cause of action:

(1) This defendant denies each and every allegation, matter and thing in said first cause of action in plaintiff's complaint set out.

(2) For a further and second defense to said first cause of action in plaintiff's complaint set out, this defendant alleges that he, up to and until the commencement of this action and for more than seven (7) years immediately prior thereto, has been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of the premises described in said first cause of action under color and claim of title thereto, and, at the time of the commencement of this action, was, ever since has been, and now is in such actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy, and this defendant is now, and at the time of the commencement of this [9] action, was the owner in fee of said premises and entitled to the possession thereof.

(3) For a further and third defense to said first cause of action in plaintiff's complaint set out, this defendant alleges that neither the plaintiff nor any of his ancestors, predecessors or grantors was seized

or possessed of the premises described in said first cause of action at any time within ten (10) years before the commencement of this action, but that, on the contrary, this defendant and his grantors and predecessors in interest have been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy thereof, under color and claim of title thereto, ever since the year 1882.

II.

Answering plaintiff's second cause of action:

(1) This defendant denies each and every allegation, matter and thing in said second cause of action in plaintiff's complaint set out.

(2) For a further and second defense to said second cause of action, this defendant alleges that he, up to and until the commencement of this action and for more than seven (7) years immediately prior thereto, has been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of the premises described in said second cause of action, under color and claim of title thereto, and at the time of the commencement of this action was, and ever since has been, and now is, in such actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy, as above set out, and he is now, and at the commencement of this action was the owner in fee of said premises and entitled to the possession thereof. [10]

(3) For a further and third defense to said second cause of action in plaintiff's complaint set out,

this defendant alleges that neither the plaintiff nor any of his ancestors, predecessors or grantors was seized or possessed of the premises described in said second cause of action at any time within ten (10) years before the commencement of this action, but that, on the contrary, this defendant and his grantors and predecessors in interest have been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy thereof, under color and claim of title thereto, ever since the year 1882.

III.

Answering plaintiff's third cause of action:

(1) This defendant denies each and every allegation, matter and thing in said third cause of action in plaintiff's complaint set out.

(2) For a further and second defense to said third cause of action, this defendant alleges that he, up to and until the commencement of this action and for more than seven (7) years immediately prior thereto, has been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of the premises described in said third cause of action, under color and claim of title thereto, and at the time of the commencement of this action was, and ever since has been, and now is, in such actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy, as above set out, and he is now, and at the time of the commencement of this action, was the owner in fee of said premises and entitled to the possession thereof.

(3) For a further and third defense to said third cause [11] of action in plaintiff's complaint set out, this defendant alleges that neither the plaintiff nor any of his ancestors, predecessors or grantors was seized or possessed of the premises described in said third cause of action at any time within ten (10) years before the commencement of this action, but that, on the contrary, this defendant and his predecessors in interest have been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy, under color and claim of title thereto, ever since the year 1882.

Wherefore, this defendant prays that plaintiff take nothing by this action and that this defendant have judgment herein, decreeing and adjudging that he is the owner of each and all of the various parcels of land and premises described in the plaintiff's complaint herein, and that this defendant have his costs and disbursements in this action.

Cross-Complaint [of J. J. McGrath].

I.

Comes now the defendant above named, J. J. McGrath, for the purpose of securing equitable relief against plaintiff in the above-entitled cause, and shows to this Honorable Court:

(1) That heretofore, to wit, on the 9th day of December, 1889, this defendant purchased, for a valuable consideration, and pursuant to such purchase received a deed of conveyance to and became the owner of that certain piece or parcel of land situated in the townsite of Juneau, in Juneau Recording Pre-

cinet, Alaska, described in paragraph two (2) of plaintiff's first cause of action in plaintiff's complaint set out, to wit:

Beginning at the southeasterly corner of Lot one (1), in Block three (3), of the townsite of Juneau, being identical with the southwesterly corner of Lot two (2) in Block three (3); thence N. 44° W. 3.6 feet; thence S. 3.6 feet to a point on the south boundary line of said Lot one (1) 1.5 feet distant from the [12] southeasterly corner; thence along the southeasterly boundary line of said lot one (1) to the place of beginning.

(2) That ever since the said 9th day of December, 1889, and under and pursuant to said purchase and deed, this defendant has been in the sole, actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of said premises, under color and claim of title thereto, and this defendant's grantors and predecessors in interest were, up to and until the time said premises were so purchased and taken possession of by this defendant, in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy thereof, under color and claim of right and title thereto since the year 1881.

(3) That on the 13th day of October, 1893, one John Olds, as trustee under and by virtue of sections 11, 12, 13, 14 and 15 of an act of Congress, approved March 3, 1891, entitled "An act to repeal timber-culture laws and for other purposes," duly entered at the United States Land Office, at Sitka, Alaska,

as a townsite, all of the lands embraced within the exterior boundaries of the townsite of Juneau, including the premises in paragraph one (1) hereof described, for the several use and benefit of the occupants of said townsite, and said John Olds and his successors in interest, as such trustees, have continued to hold said office of trustee for the townsite of Juneau since then and during all the time hereinafter mentioned, and that pursuant to said entry, and on the 4th day of September, 1897, a United States patent was issued to said John Olds, as such trustee, for the townsite of Juneau, Alaska, conveying to said Olds all of the lands and premises above described for the several use and benefit of the occupants of said townsite; that certificate of said entry and said patent was each within a month after issuance duly recorded in the office of the recorder for Harris Mining District, the present Juneau Recording [13] Precinct, wherein said land was and is situated, and are now of record in said office.

(4) That at the time the said townsite entry was made, as well as at the time said patent was issued, this defendant was the sole owner and sole and actual occupant of the premises described in paragraph one (1) of this cross-complaint, in manner and form as alleged in paragraph two (2) hereof, and continued such occupancy and possession ever after and was entitled to a deed from said townsite trustee for said premises; and prior to the said townsite entry, this defendant had erected and ever since has maintained and does now maintain upon said premises a valuable building and improvements, but that nev-

ertheless and on the 3d day of December, 1897, and while this defendant was in such sole and actual possession and occupancy of said premises, and while he had permanent and valuable improvements thereon, the plaintiff herein filed with the then trustee for said townsite an application for deed to all of said Lot One (1), in Block Three (3), including the premises described in paragraph one (1) hereof, together with this defendant's building and improvements thereon, and then and there, falsely and fraudulently, and with the intent and for the purpose of deceiving and misleading said trustee, and for the purpose of inducing said trustee into believing that said plaintiff was then and ever since prior to the said townsite entry had been the actual occupant of said premises and entitled to a deed therefor, and for the purpose and with the intent of cheating, defrauding and depriving this defendant of his said property, represented to said trustee that he, the said plaintiff, was then and ever since prior to the said townsite entry had been the actual occupant and owner of said premises and the whole thereof and entitled to a deed [14] therefor from said trustee, although he, the said plaintiff, then and there well knew that he was not then and never had been either the owner or occupant of said premises in paragraph one (1) hereof described, or any part thereof, but that this defendant was and had been such exclusive owner and occupant, as above set out, and entitled to such deed.

(5) That by reason of said false and fraudulent representations by the said plaintiff, and not other-

wise, said trustee was induced to believe and did believe said representations to be true, and was thereby induced to believe that said plaintiff was then and ever since prior to the said entry had been the actual occupant of said premises and the whole thereof, and entitled to deed therefor; and that by reason thereof, the said trustee did, on the 13th day of July, 1898, execute to said plaintiff a deed conveying to him all of said Lot One (1), in Block Three (3), under and pursuant to said belief on the part of said trustee, so caused by said false and fraudulent representations that said plaintiff was then the actual occupant and owner of said premises, and had been such owner and occupant ever since prior to the said townsite entry, and the said deed so issued and executed was received by said plaintiff when, and notwithstanding the fact that, he knew it had been executed as a result of said false and fraudulent representations above set out, and notwithstanding the fact he knew that he, the said plaintiff, was not entitled to such deed, but that this defendant was entitled thereto, a copy of which deed is hereto attached and marked Exhibit "B."

(6) That this defendant, until a long time after said deed was issued, had no notice or knowledge of the fact that said plaintiff had applied to said trustee for a deed to the said premises or that plaintiff claimed or pretended to claim to be [15] the owner or occupant of the same, and at no time prior to the execution of said deed, or for a long time thereafter had any notice, knowledge, intimation or suspicion that plaintiff intended or in any manner en-

deavored to procure a deed to said premises, except as hereinafter set out, and had no opportunity to appear before said trustee to present his objections to the execution of such deed or to submit evidence of the falsity of the representations of plaintiff aforesaid, or to submit evidence before said trustee to the effect that not plaintiff, but this defendant was entitled to a deed for said premises; and this defendant further alleges that no time had or has ever been fixed by the Secretary of the Interior, or any other officer under him or by the said townsite trustee, within which the beneficiaries or *cestuis que trustent* of said townsite trust were required to file or submit their application for deed or evidence that they were occupants of town lots and entitled to such deeds, nor has any notice ever been published or given in any manner, by any trustee, officer or other party, informing or notifying this defendant or other occupants of town lots in the said townsite or any of the *cestuis que trustent* of said trust that unless their respective application for deeds were filed or submitted within a specified time their rights or claims to a deed or deeds from said trustee would be barred, and that said deed was so issued to said plaintiff without any time limit having been fixed by said trustee, or by the Secretary of the Interior, or any officer under him, within which this defendant's claim to said premises be presented lest he forfeit his right to said premises or to deed therefor, and that by reason of said facts and the further facts above set out that plaintiff was not entitled to deed for said premises, defendant

avers that said deed was executed without warrant in law and is wholly void [16] and of no effect, but has been ever since its issuance, and now is, a cloud upon defendant's right and title to said premises.

(7) That heretofore, to wit, on the 3d day of January, 1898, this defendant duly filed with the then trustee of said townsite an application in due form for the premises owned and occupied by this defendant in said townsite; that by reason of inadvertence and mistake, the premises occupied and owned by this defendant at the time said application was filed and ever since prior to the said townsite entry, was erroneously described as follows; to wit:

“That certain piece or parcel of land situated, lying and being between lots two (2) and three (3), in Block three (3), as per Hannan's plat, said piece or parcel of land fronting on the water front of said town of Juneau, and being sixty (60) feet in width on said water front street and extending back a distance of one hundred (100) feet, and being twenty-four (24) feet in width on or at the rear end or line of said described piece or parcel of land.”

That subsequently this defendant discovered that said description was erroneous and defective, and that it did not include all of the entire tract or property so occupied and owned by this defendant in said Block three (3) of said trustee's townsite plat; that upon said discovery by this defendant, he employed one George W. Garside, who was then and there a surveyor of good repute, holding a commis-

sion as United States mineral and land surveyor, and then believed by this defendant to be competent to survey the premises then actually occupied by this defendant, that such survey was consequently so made by said surveyor, and pursuant to such survey, the description of this defendant's said premises by metes and bounds was prepared by said surveyor as follows, to wit:

“Beginning at corner No. 1, on the Northeast side of Front Street, thence,

First Course S. 83 degrees, 4 minutes E. 6.5 feet along the NE. Line of said Front Street to corner of approach and [17] sidewalk to postoffice building, whence iron spike at the SW. corner of Block 2 of Official Survey, said spike being the Initial Point of such Survey, bears S. 64 degrees 40 minutes W. 296.2 feet distant, thence,

Second Course, S. 83 degrees 4 minutes E. 53.5 feet along NE. side of Front Street to SE. corner of Lot 1, in Block G, thence,

Third Course, N. 12 degrees, 30 minutes W. 76.9 feet, thence,

Fourth Course, N. 49 degrees, 45 minutes W. 95.8 feet to NE. corner of Lot 2, in Block 3, thence,

Fifth Course, S. 57 degrees, 52 minutes W. along the NW. end line of said Lot 2, in Block 3, 50 feet to NW. corner of said lot, thence,

Sixth Course, S. 44 degrees E. along the Westerly side line of said Lot 2, in Block 3, 100 feet to SW. corner of said lot, thence,

Seventh Course, S. 4 degrees, 38 minutes E. 32.2 feet to place of beginning;

The said described piece or parcel of land includes all of Lot 2, in Block 3, of Official Survey of town-site, and a fractional portion of Lot 3, in the same Block, together with a fractional portion of Block G lying between the SE. end line of said Lots 2 and 3, in Block 3, and Front Street, which latter fractional piece of Block G is described as follows, Commencing at Point No. 1 of the foregoing description of Exterior Boundaries, thence,

First Course, S. 83 degrees 4 minutes E. 60 feet along NE. side line of Front Street to SE. corner of Lot 1, in Block G, thence,

Second Course, N. 12 degrees 30 minutes W. 70.4 feet to intersection SE. end line Lot 3, in Block 3, thence,

Third Course, S. 57 degrees 52 minutes W. 55.3 feet to SW. corner of Lot 2 in Block 3, thence,

Fourth Course, S. 4 degrees, 38 minutes E. 32.2 feet to place of beginning, said fractional piece containing .0591 acres, and the whole area claimed containing .172 acres."

That on the 9th day of December, 1898, this defendant's said application for deed was so amended as to insert the description of the property last above given instead of the description of the premises originally contained in said application as above set out; that this defendant is not a surveyor and believed the survey as made by said Garside was a correct survey of the premises then occupied and claimed by this defendant and believed the description last above quoted, which was prepared by said surveyor, was correct and included all the property

and premises then occupied by this defendant in said Block three (3), whereas, in truth and in fact, said survey was erroneous in this: that it failed to show or disclose the fact that the premises occupied and claimed by this defendant covered a portion of Lot one (1), in Block three (3), to wit, [18] that portion described in paragraph one (1) hereof; that at the time said survey was made and ever since before said townsite entry was made, this defendant had erected and maintained and does now maintain, upon said premises a large two-story frame store building, which at the time of said survey was known and designated as "McGrath's Postoffice Building"; that the westerly side wall of said building now stands, and ever since its erection has stood, upon a line running N. $17^{\circ} 55'$ W. from a point on the north line of Front Street, whence the west corner of Block G and the SW. corner of Block 3 bear N. $82^{\circ} 4'$ W. 51.8 feet distant, which line forms the westerly side line of the premises described in section one (1) hereof, that this defendant's said building then, and ever since its erection has, stood upon and covered all of said premises and there was not at the time of said survey, or at any other time, any difficulty in determining by mere inspection that said premises were claimed and actually occupied by this defendant, but that the lines and corners of the various lots into which the townsite had been subdivided by the survey of the townsite trustee were not marked and the boundaries of the various lots in said townsite could never be determined by anybody but a surveyor by the use of proper instruments for that purpose, and even then

with the greatest difficulty; that said surveyor failed to find or correctly establish the lines and corners of lot one (1), in block three (3), and failed to discover and disclose in his said survey that the said building and premises of this defendant covered and comprised said portion of said lot one (1), and that the SE. corner of said lot one was underneath said building; that this defendant had no means of ascertaining the lines or limits of the various lots and blocks as laid out and surveyed [19] by the townsite trustee except by the employment of a surveyor in the manner aforesaid, and this defendant was ignorant of the fact that said survey was incorrect in the manner above stated and that said lot one as laid out and platted by said trustee comprised part of this defendant's premises until this action was commenced.

(8) That pursuant to said application for deed by this defendant, and on the 14th day of January, 1901, the trustee of said townsite executed a deed conveying and intending to convey to this defendant, the premises described in paragraph one (1) hereof, a copy of which deed is hereto attached and marked Exhibit "A"; that the point of beginning, or initial point, of the description of the premises conveyed by said deed is a point on the northerly side line of Front Street from which the westerly corner of Block G and the SW. corner of Lot one, Block three, bears N. 83° 4' W. 51.8 feet distant, but that by clerical error on the part of the townsite trustee, the initial point of the said description is in said deed erroneously designated as follows: "Beginning at a point

on Front Street whence initial corner bears N. $83^{\circ} 4'$ W. 51.8 feet, thence S. $57^{\circ} 52'$ W. 234 feet distant"; when in fact and in truth it was the intention of this defendant, the said trustee and all parties concerned to designate the said initial point as follows, to wit: Beginning at a point on Front Street whence West corner of Block G, and SW. corner of Lot one, Block three, bears N. $83^{\circ} 04'$ W. 51.8 feet distant and initial corner bears S. $57^{\circ} 51'$ W. 234 feet distant; that the first course or first line from said point of beginning of the description in said deed contained runs N. $17^{\circ} 55'$ W, and intersects the southerly end line of said Lot one a distance of 1.5 feet westerly from the SE. corner of said Lot [20] and the easterly side line of said lot 3.6 feet northerly from said SE. corner, and includes in the premises conveyed by said deed the premises described in section one (1) hereof, it being the true intent of said trustee to convey to this defendant by such deed all the ground or premises lying east of said first course or line.

(9) That said deed of January 13, 1898, executed by said trustee to Emery Valentine, the plaintiff herein, for Lot one in Block three, was on the 20th day of July, 1898, duly recorded in the office of the Recorder of Juneau Recording Precinct, wherein said premises are situated, and is now of record therein; that said deed is a cloud upon this defendant's right and title to said premises in section one (1) hereof set out, and plaintiff herein is now relying on the said deed for his claim of title to said premises and has instituted this action at law on the strength of said deed, and not otherwise, and intends to prove

his title to said premises in this action by and through said deed and not otherwise; that the trustee of said townsite is now and ever since the execution of said deed to this plaintiff has been without legal title to said premises described in paragraph one (1) hereof, and without power to convey the same by deed to this defendant for the reasons above stated and that plaintiff is the owner and in possession of all those portions of lot one (1) in Block G, and lots one (1), two (2) and three (3), in Block three (3), not occupied and claimed by this defendant.

(10) That this defendant has no plain, speedy or adequate remedy in the ordinary course of law.

II.

For a further and second cause of action for equitable relief against plaintiff in the above-entitled cause, this defendant shows to this honorable Court: [21] (1) That heretofore, to wit, on the 9th day of December, 1889, this defendant purchased for a valuable consideration, took possession of and occupied as a town lot for use as a residence and business place, and pursuant to such purchase received a deed of conveyance to and became the owner of that certain piece or parcel of land situated in the townsite of Juneau, in Juneau Recording Precinct, Alaska, described as follows, to wit:

Commencing at the point on the north side line of Front Street whence west corner of Block G and SW. corner of Lot one (1), in Block three (3) bears N. 83° 04' W. 51.8 feet distant; thence N. 17° 55' W. 92.1 feet; thence N. 30° 51' W. 31.3 feet; thence N. 59° 09' E. 28.5 feet to the NE. corner of the building

occupied by the defendant, known as the "McGrath house"; thence S. $37^{\circ} 35'$ E. 87.17 feet to the SW. corner of Lot three (3), in Block three (3); thence S. $16^{\circ} 46'$ E. 68.8 feet to the north side line of Front Street; thence along the north side of Front Street N. $83^{\circ} 04'$ W. 53.5 feet to point of beginning.

(2) That ever since the 9th day of December, 1889, and under and pursuant to such purchase and deed, this defendant has been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of said premises, under color and claim of title thereto, as aforesaid, and this defendant's grantors and predecessors in interest were up to and until the time said premises were so purchased and taken possession of by this defendant in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy thereof, under color and right of title thereto since the year 1881, and during all that time and continuing to the present time, this defendant and his said grantors and predecessors in interest have maintained valuable improvements thereon in the way of a store building, shop and residence building and other improvements.

(3) That on the 13th day of October, 1893, and while this defendant was such sole exclusive occupant of said premises as above set out, one John Olds, as trustee, under and by virtue [22] of sections 11, 12, 13, 14, and 15 of an Act of Congress, approved March 3, 1891, entitled "an Act to repeal Timber Culture Laws and for other purposes," duly en-

tered at the United States Land Office at Sitka, Alaska, as a townsite, all of the lands embraced within the exterior boundaries of the townsite of Juneau, including the premises in paragraph one (1) hereof described, for the several use and benefit of the occupants of said townsite, and said John Olds and his successors in interest, as such trustees, have continued to hold said office of trustee for the townsite of Juneau since then and during all the time hereinafter mentioned, and that pursuant to said entry and on the 4th day of September, 1897, a United States patent was issued to said John Olds, as such trustee, for the townsite of Juneau, conveying to said Olds all of the lands and premises above described for the several use and benefit of the occupants of said townsite; that the certificate of said entry and said patent was each within a month after the issuance thereof duly recorded in the office of the recorder for Harris Mining District, now Juneau Recording Precinct, wherein said land is and was situated, and they are now of record in said office.

(4) That at the time the said townsite entry was made, as well as at the time said patent was issued, this defendant was the sole owner and sole and actual occupant of the premises described in paragraph one (1) of the second cause of action of this cross-complaint, in manner and form as alleged in paragraph two (2) hereof, and continued such occupancy and possession ever after and was entitled to a deed from said townsite trustee for said premises, and prior to the said townsite entry, this defendant had erected and ever since has maintained, and does

now maintain, upon said premises, valuable buildings and other improvements, but that, nevertheless, and on the 3d day of December, 1897, and while this defendant [23] was in such sole and actual possession and occupancy of said premises, and while he had permanent and valuable improvements thereon, the plaintiff herein filed with the then trustee for said townsite an application for a deed to all of said tract in paragraph one (1) of this cause of action described, together with this defendant's buildings and improvements thereon, and then and there falsely and fraudulently, and with the intent, and for the purpose of inducing said trustee into believing that said plaintiff was then, and ever since prior to the said townsite entry had been, the actual occupant of said premises and entitled to deed therefor, and for the purpose of and with the intent of cheating, defrauding and depriving this defendant of his said property, represented to said trustee that he, the said plaintiff, was then, and ever since prior to the said townsite entry had been, the actual occupant and owner of said premises, and the whole thereof, and entitled to a deed therefor from said trustee, although he, the said plaintiff, then and there well knew that he was not then and never had been either the owner or occupant of said premises in paragraph (1) hereof described or of any part thereof, but that this defendant was and had been such exclusive owner and occupant as above set out, and entitled to such deed.

(5) That by reason of said false and fraudulent representations by the said plaintiff, and not otherwise, said trustee was induced to believe and did be-

lieve that said plaintiff was then and ever since prior to the said entry had been the actual occupant of all of lot three in Block three of the townsite of Juneau, which said lot includes a portion of this defendant's premises as described in paragraph one (1) hereof, and that said trustee was by such false and fraudulent representations, induced to believe and did believe that said [24] plaintiff was entitled to a deed to the whole of said lot three (3), and that by reason thereof, the said trustee did, on the 14th day of July, 1898, execute to said plaintiff a deed conveying to him all of lot three (3), in Block three (3), under and pursuant to said erroneous belief on the part of the said trustee so caused by said false and fraudulent representations that said plaintiff was then the actual occupant and owner of said premises, and had been such owner and occupant ever since prior to said townsite entry, and the said deed so issued and executed was received by said plaintiff when, and notwithstanding the fact that he, the said plaintiff, knew it had been executed as a result of said false and fraudulent representations above set out, and notwithstanding the further fact that he knew that he, the said plaintiff, was not entitled to such deed, but that this defendant was entitled to a deed to as much of said lot three (3) as is included in the description of defendant's property set out in paragraph one (1) of this cause of action.

(6) That heretofore, to wit, on the 3d day of January, 1898, this defendant duly filed with the then trustee of said townsite an application in due form for the premises owned and occupied by this defend-

ant in said townsite; that by reason of inadvertence and mistake, the premises occupied and owned by this defendant, as above set out, at the time the said application was filed was erroneously described as follows, to wit:

“That certain piece or parcel of land situated, lying and being between lots two (2) and three (3), in Block three (3), as per Hannan’s plat, said piece or parcel of land fronting on the water front of said town of Juneau, and being sixty (60) feet in width on said water front street and extending back a distance of one hundred (100) feet, and being twenty-four (24) feet in width on or at the rear end or line of said described piece or parcel of land.” [25]

That subsequently this defendant discovered that said description was erroneous and defective and that it did not include all of the entire tract or property occupied and owned by this defendant in said Block three (3) of said trustee’s townsite plat; that upon said discovery by this defendant, he employed one George W. Garside, who was then and there a surveyor of good repute, holding a commission as United States Mineral and Land Surveyor, and then believed by this defendant to be competent to survey the premises then actually occupied by this defendant, as above set out; that such survey was consequently so made by said surveyor, and pursuant to such survey the description of this defendant’s said premises by metes and bounds was prepared by said surveyor, as follows, to wit:

“Beginning at corner No. 1, on the Northeast side of Front Street, thence,

First Course S. 83 degrees, 4 minutes E. 6.5 feet along the NE. line of said Front Street to corner of approach and sidewalk to postoffice building, whence iron spike at the SW. corner of Block 2 of Official Survey, said spike being the Initial Point of such Survey, bears S. 64 degrees 40 minutes W. 296.2 feet distant, thence,

Second Course S. 83 degrees 4 minutes E. 53.5 feet along NE. side of Front Street to SE. corner of Lot 1, in Block G, thence,

Third Course, N. 12 degrees, 30 minutes W. 76.9 feet, thence,

Fourth Course N. 49 degrees, 45 minutes W. 95.8 feet to NE. Corner of Lot 2, in Block 3, thence,

Fifth Course, S. 57 degrees, 52 minutes W. along the NW. end line of said lot 2, in Block 3, 50 feet to NW. corner of said lot, thence,

Sixth Course S. 44 degrees E. along the Westerly side line of said Lot 2 in Block 3, 100 feet to SW. corner of said lot, thence,

Seventh Course, S. 4 degrees, 38 minutes E. 32.2 feet to place of beginning:

The said described piece or parcel of land includes all of Lot 2 in Block 3, of Official Survey of townsite, and a fractional portion of lot 3 in the same Block, together with a fractional portion of Block G lying between the SE. end line of said Lots 2 and 3 in Block 3, and Front Street, which latter fractional piece of Block G is described as follows, commencing at Point No. 1, of the foregoing description of Exterior Boundaries, thence,

First Course S. 83 degrees 4 minutes E. 60 feet

along NE. side line of Front Street to SE. corner of Lot 1, in Block G, thence,

Second Course, N. 12 degrees 30 minutes W. 70.4 feet to intersection SE. end line Lot 3, in Block 3, thence, [26]

Third Course S. 57 degrees 52 minutes W. 55.3 feet to SW. corner of Lot 2 in Block 3, thence,

Fourth Course S. 4 degrees, 38 minutes E. 32.2 feet to place of beginning, said fractional piece containing .0591 acres, and the whole area claimed containing .172 acres."

That on the 9th day of December, 1898, this defendant's said application for deed was so amended as to insert the description of the property last above given instead of the description of the premises originally contained in said application as above set out; that this defendant is not a surveyor and believed the survey as made by said Garside was a correct survey of the premises then occupied and claimed by this defendant, and believed the description last above quoted, which was prepared by said surveyor, was correct and included all the property and premises then occupied by this defendant in said Block three; that at the time said amended application for deed was so filed the aforementioned deed to Lot three had already been issued to the plaintiff herein, as above set out, and the said town-site trustee then and there ruled and decided that by reason of having issued the said deed to lot three to this plaintiff, he, the said trustee, had parted with all title to said lot three and had no further jurisdiction over the same and could not and would not hear any

evidence of this defendant in support of his right to a deed to any portion of said lot three but that inasmuch as the deed had not, at that time, been issued by the said townsite trustee to Lot two (2), the said trustee ordered a hearing to be had for the purpose of determining whether this defendant or the plaintiff herein was entitled to a townsite trustee's deed to said Lot two (2), and how much of said Lot two (2) each was entitled to, if any; that pursuant to said order of the said trustee, a hearing was had and evidence introduced and adduced in support of the claims of the respective applicants for deed to Lot Two (2) and portions thereof; that at [27] the conclusions of said hearing, the said townsite trustee decided and adjudged that this defendant was entitled to deed to all of the premises that he then occupied and that this defendant had occupied said premises and was entitled to the possession thereof at the time the said townsite entry was made and ever after; that in endeavoring in his decision to describe the premises then actually occupied by this defendant and to which this defendant pursuant to the opinion and adjudication of the said trustee was entitled to deed for, said trustee through inadvertence and mistake described the said premises as follows, to wit:

“Portion of lot one block ‘G’ and portion of lot two, block three, Juneau, Alaska, more particularly described as follows:

Beginning at a point on Front street whence initial corner bears north 83° 4' west 51.8 feet; thence south 57° 52' west 234 feet distant; thence north 17°

55' west 92.1 feet; thence north $29^{\circ} 8'$ west 30.3 feet; thence north $60^{\circ} 52'$ east 18.1 feet; thence south 44° east 87.4 feet; thence south $16^{\circ} 46'$ east 68.8 feet; thence north $83^{\circ} 4'$ west 53.5 feet to point of beginning.

Whereas in truth and in fact said description so given unintentionally eliminates and excludes from the premises so decided to be the property of this defendant a portion of said defendant's premises and a portion of the very improvements which this defendant was then and ever since prior to the said entry had been maintaining on said premises, to wit: That upon the northerly end of the said premises described in section one (1) hereof, this defendant has had ever since prior to the said townsite entry, and now has, a residence building which extends to and occupies ground up to a line one (1) foot and six (6) inches north of the north line so inadvertently given by the townsite trustee, and that all of the premises described in the first paragraph of section two (2) in plaintiff's complaint was at the time of said contest, is now, and ever since prior to the said townsite entry has been covered in its entirety by the said residence building of this defendant, [28] and in rendering said decision, it was the intention of the said trustee to include all of said house or residence building, together with the ground upon which the same stood, save and except that portion of said house and premises standing on portion of lot three (3) as above stated and for the reasons heretofore set out, and that at the time the said decision was rendered, both plaintiff herein and this

defendant, as well as said townsite trustee, believed that said description above set out covered and included all the premises in said lot two (2) covered by said house of this defendant; that in truth and in fact the premises which the said townsite trustee then and there intended to deed to this defendant are described as follows, to wit:

Commencing at the north side line of Front street whence the westerly corner of Block "G" and the SW. corner of Lot One (1), in Block three (3), bears N. $83^{\circ} 04'$ W. 51.8 feet distant; thence N. $17^{\circ} 55'$ W. 92.1 feet; thence N. $30^{\circ} 51'$ W. 31.3 feet; thence N. $59^{\circ} 09'$ E. 18.5 feet more or less, to the dividing line between Lots two (2) and Three (3), in Block Three (3); thence S. 44° E. 88.9 feet; thence S. $16^{\circ} 46'$ E. 68.8 feet; thence N. $83^{\circ} 04'$ W. 53.5 feet to point of beginning.

That the said error in said description of the premises owned and occupied by this defendant was at the time of the rendition of said decision by said townsite trustee, as well as at the time of the issuance of the deed to this defendant, as hereinafter set out, unknown to said trustee and the parties hereof and that this defendant was not aware of the error in said description and survey until the commencement of this action.

(7) That pursuant to said decision by the said townsite trustee, and on the 14th day of January, 1901, the said trustee of said townsite executed a deed to this defendant, a copy of which deed is hereto attached and marked Exhibit "A"; that the point of beginning or initial point of the description of the

premises conveyed by said deed is a point on the northerly side line of Front Street from which the westerly corner of [29] Block "G" and the S. W. Corner of Lot one (1), in Block three (3), bears N. $83^{\circ} 04'$ W. 51.8 feet distant, but that by clerical error or some inadvertence on the part of the townsite trustee the initial point of the said description is in said deed erroneously designated as follows: "Beginning at the point on Front Street whence Initial Corner bears N. $83^{\circ} 04'$ W. 51.8 feet, thence S. $57^{\circ} 52'$ W. 234 feet distant." When in fact and in truth, it was the intention of this defendant, the said trustee and all parties concerned to designate the said initial point as follows, to wit: Beginning at the point on Front Street whence West corner of Block G and SW. corner of Block 3 bear N. $83^{\circ} 04'$ W. 51.8 feet distant, and initial corner bears S. $57^{\circ} 51'$ W. 234 feet distant.

(8) That that portion of said Lot three (3), belonging to and occupied by this defendant, as above stated, and which was included in the aforesaid deed of July 14, 1898, to the plaintiff is described as follows, to wit:

Beginning at the SW. corner of Lot three, the same being the SE. corner of Lot two, thence N. 44° W. along the common boundary line between said lots two and three 88.9 feet; thence N. $59^{\circ} 09'$ E. 10 feet to a point, the same being the NE. corner of the said residence building owned and occupied by this defendant; thence southerly to point of beginning.

That said portion of the said lot three (3) includes all the premises and tracts described in the second

cause of action of plaintiff's complaint herein except that portion of the premises described in said cause of action constituting a part or portion of said lot two (2); that said deed of July 14, 1898, was recorded on the 20th day of July, 1898, on page 203, Book 13 of Deeds, in the office of the recorder of Juneau Recording Precinct—a copy of which deed is hereto attached and marked Exhibit "C"; that this defendant was not aware and had no knowledge that the said townsite trustee intended to [30] issue a deed to this plaintiff for the entire portion of the said Lot three (3) until long after the said deed had been issued, and this defendant had no opportunity to appear before said trustee to present his objections to the execution of such deed or to submit evidence of the falsity of the representations of plaintiff aforesaid or to submit evidence before said trustee to the effect that not plaintiff but this defendant was entitled to a deed for said premises in this paragraph described; this defendant further alleges that no time had or has ever been fixed by the Secretary of the Interior or any other officer under him, or by the said townsite trustee within which the beneficiaries or *cestuis que trustent* or said townsite trust were required to file or submit their applications for deed or any evidence that they were occupants of town lots and entitled to such deeds; nor has any notice ever been published or given in any manner by any trustee, officer or other party, informing or notifying this defendant or other occupants of town lots in said townsite, or any of the *cestui que trustent* of said trust that, unless their respective application for

deeds were filed or submitted within a specified time, their rights or claims to a deed or deeds from said trustee would be barred, and that said deed was so issued to said plaintiff without any time limit having been fixed by said trustee or by the Secretary of the Interior, or any officer under him, within which this defendant's claim to said premises be presented lest he forfeit his right to said premises or to deed therefor, and that by reason of said facts and the further facts above set out that plaintiff was not entitled to a deed for said premises, defendant avers that said deed was executed without warrant of law and is wholly void and of no effect, but has been ever since its issuance, and now is, a cloud upon defendant's right and [31] title to said premises.

(9) That pursuant to his said decision involving the controversy before the said trustee, between this plaintiff and this defendant, concerning the right to the various portions of said Lot two (2), the said trustee, on the 18th day of July, 1901, executed to this plaintiff his deed to that portion of Lot two (2) not owned and occupied by this defendant, which deed was on the said 20th day of July, 1901, recorded on page 297, in Book 13 of Deeds, in the office of the recorder of Juneau Recording Precinct—a copy of which deed is hereto attached and marked Exhibit "D"; that by said inadvertence and mistake in the description of the premises, due to error in survey, the said deed was made to convey a portion of the premises then owned and occupied by this defendant, and which the said townsite trustee then intended to and believed he had deeded to this defendant pur-

suant to his said decision, which premises so erroneously and inadvertently included in said deed to this plaintiff are the same premises constituting a part of said Lot two (2) sued for by this plaintiff in his second cause of action in his complaint herein; that said error in said deed was unknown to this defendant until this action was commenced.

(10) That the said deeds, Exhibits "C" and "D," are, and each is, a cloud upon this defendant's right and title to the premises in section one (1) hereof set out, and plaintiff herein is now relying on the said deeds for his claim of title and right to the said premises, for the possession of which his said second cause of action is brought, and has instituted this action at law on the strength of said deeds and not otherwise; and intends to prove his title and right of possession to said premises in this action by and through said deeds and not otherwise; that the trustee of said townsite is [32] now and ever since the execution of said deeds has been without legal title to said premises described in paragraph one (1) hereof, and without power to convey the same by deed to this defendant for the reasons above stated, and that plaintiff is the owner and in possession of all those portions of lots two (2) and three (3) in said Block three (3) not occupied and claimed by this defendant.

(11) That this defendant has no plain, speedy and adequate remedy in the ordinary course of law.

Wherefore, this defendant prays that it may please this Honorable Court to consider, adjudge and decree:

(1) That the said plaintiff, Emery Valentine, is a trustee, holding in trust for this defendant, J. J. McGrath, that certain piece or parcel of land in the townsite of Juneau, Juneau Recording Precinct, Alaska, described as follows, to wit:

Commencing at the SE. corner of Lot one (1), which is also the SW. corner of Lot two (2), in Block three (3), thence N. 44° W. 3.6 feet; thence S. $17^{\circ} 55'$ E. to the south end line of said Lot one (1); thence N. $57^{\circ} 52'$ E. along the south end line of said lot one (1) to the point of beginning.

And that said Emery Valentine be ordered and directed to convey the said piece or parcel of land to this defendant by deed properly executed for that purpose.

(2) That the plaintiff herein, Emery Valentine, be adjudged and decreed a trustee, holding in trust for the use and benefit of this defendant, J. J. McGrath, that certain piece and parcel of land situated in the townsite of Juneau, Juneau Recording Precinct, District of Alaska, described as follows, to wit:

Commencing at a point on the dividing line between lots two (2) and three (3), in Block three (3), 11.1 feet S. [33] of the NE. corner of lot two (2) and NW. corner of said lot three (3); thence S. $59^{\circ} 09'$ W. 18.5 feet to the NW. corner of McGrath residence building; thence S. $30^{\circ} 51'$ E. 24.2 feet to the SW. corner of said building; thence N. $29^{\circ} 08'$ W. 23.3; thence N. $60^{\circ} 52'$ E. 17.1 feet to the dividing line between said Lots two (2) and three (3); thence N. 44° W. to the place of beginning.

—and that said Emery Valentine be *order* and di-

rected by this Honorable Court to convey to this defendant the said premises by good and sufficient deed for that purpose properly executed.

(3) That plaintiff, Emery Valentine, be adjudged and decreed to be a trustee, holding in trust for the use and benefit of this defendant, the following tract or parcel of land situated in the townsite of Juneau, Juneau Recording Precinct, District of Alaska, described as follows, to wit:

Commencing at the SW. corner of Lot three (3), the same being the SE. corner of Lot two (2), in Block three (3), thence N. 44° E. along the boundary line between said Lot two (2) and three (3) 88.9 feet to the north end of said "McGrath house"; thence N. $59^{\circ} 09'$ E. a distance of 10 feet to the NE. corner of said McGrath building; thence southeasterly to the point of beginning.

—and that said Emery Valentine be ordered and directed by this Honorable Court to convey to this defendant the said tract by deed for that purpose properly made and executed.

(4) That that certain deed executed January 14, 1901, to this defendant, by Thomas R. Lyons, as trustee, and recorded on page 295, of Book 13 of Deeds, in the office of the Recorder of Juneau Recording Precinct, Alaska, be reformed so that the description of the property conveyed by said deed be made to read as follows, to wit:

All that portion of Lot one (1), in Block "G," and Lots one (1), two (2), and three (3), in Block three (3), described by metes and bounds as follows: Commencing at the point on the north side line of Front

Street whence west corner of Block 'G' and SW. corner of Lot one (1), in Block three (3), bears N. $83^{\circ} 04' W.$ 51.8 feet distant; thence N. $17^{\circ} 55' W.$ 92.1 feet; thence N. $30^{\circ} 51' W.$ 31.3 feet; thence N. $59^{\circ} 09' E.$ 28.5 feet to the NE. corner of the building occupied by the defendant, known as the "McGrath house"; [34] thence S. $37^{\circ} 35' E.$ 87.17 feet to the SW. corner of Lot three (3), in Block three (3); thence S. $16^{\circ} 46' E.$ 68.8 feet to the north side line of Front Street; thence along the north side line of Front Street N. $83^{\circ} 04' W.$ 53.5 feet to the point of beginning.

(5) That this defendant be decreed and adjudged by this Honorable Court to be the sole owner in fee of all that tract and premises of land described in paragraph one (1) of the second cause of action, and specifically set out in section 4 of this prayer for relief, and that plaintiff herein has no right, title or interest in or to any part or portion of said premises.

(6) That the trial of the issues under the various causes of action in plaintiff's complaint set out and all the proceedings thereunder be abated and stayed until the issues raised and allegations set out in this defendant's cross-complaint be heard, tried and fully adjudicated by this Court.

(7) That this plaintiff have such other and further relief in the premises as to this Honorable Court may seem just, fit and proper and that this defendant have his costs and disbursements herein.

LEWIS P. SHACKLEFORD, and
JOHN RUSTGARD,

Attorneys for Defendants. [35]

Exhibit "A" [to Cross-Complaint].

THIS INDENTURE, made this 14th day of January, in the year of our Lord one thousand nine hundred and one, by and between Thomas R. Lyons as trustee for the townsite of Juneau, in the Territory of Alaska, party of the first part, and John J. McGrath, of Juneau, in the District _____, and _____, of Alaska, party of the second part, witnesseth:

WHEREAS, said party of the first part has been appointed trustee for said townsite by the Secretary of the Interior, under the provisions of sections 11 and 15 inclusive, of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber-culture laws, and for other purposes," (26 Stats., 1905), and

WHEREAS, pursuant to said appointment as such trustee, said party of the first part has duly qualified and entered upon the performance of his duties, as such, as provided in said act and the regulations of the Secretary of the Interior, dated June 3, 1891, for his guidance, and

WHEREAS, on the 13th day of October, A. D. 1893, said party of the first part, as such trustee, entered the tract of land upon which the townsite of Juneau is situate being survey No. 1, of public surveys in Alaska, under said act, executed by Geo. W. Garside, United States deputy surveyor, under instructions from the United States Marshal, ex-officio surveyor-general of Alaska, bearing date of the 8th day of March, 1892, approved by said United States marshal, ex-officio surveyor-general, on the 21st day of October, 1892, and

WHEREAS, said trustee has entered said land in trust for the several use and benefit of the occupants thereof, according to their respective interests, and has made survey thereof into lots, blocks, squares, streets, and alleys, and has assessed upon each of the lots in said townsite the sums of money contemplated by the instructions of the Secretary of the Interior, and [36]

WHEREAS, said trustee finds that according to the true spirit and intent of said act that said party of the second part is interested in said townsite and entitled to the premises thereon as hereinafter described, and

WHEREAS, said party of the second part has paid the assessments upon said property amounting to the sum of seventy-two dollars.

NOW, THEREFORE, said party of the first part, as such trustee, by virtue of the power vested in and conferred upon him by the terms of said act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents does grant, convey, and confirm unto the said party of the second part and his heirs and assigns all the following lot, piece, and parcel of land situate in the town of Juneau, and Territory of Alaska, described as follows, to wit:

All that portion of lot one (1) Block "G" and lot two (2) Block three, described by metes and bounds as follows: Beginning at a point on Front Street, whence initial Corner bears north $83^{\circ} 4'$ west 51.8 feet; thence South $57^{\circ} 52'$ West, 234 feet distant; thence North $17^{\circ} 55'$ west 92.1 feet; thence North

29° 8' West 30.3 feet; thence North 60° 52' east 18.1 feet; thence South 44° east 87.4 feet; thence South 16° 46' east 68.8 feet; thence North 83° 4' west 53.5 feet to point of beginning

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, forever.

IN WITNESS WHEREOF, said party of the first part, as such trustee, has hereunto set his hand and seal on the day and year first above written.

THOMAS R. LYONS, [Seal]

Trustee for the Townsite of Juneau, Alaska Territory.

In presence of

T. J. DONOHUE.

ROSE MILLER. [37]

Territory of Alaska:

Be it remembered, that on this 14th day of January, A. D. ———, before me, a Notary Public, came Thomas R. Lyons to me personally known to be the trustee of said townsite of Juneau, Alaska, and the identical person described in, and whose name is affixed to, the foregoing conveyance as grantor, and he acknowledges the execution of the same to be his voluntary act and deed as such trustee, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal]

T. J. DONOHUE,
Notary Public. [38]

Exhibit "B" [to Cross-Complaint].

THIS INDENTURE, made this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-eight, by and between Thomas R. Lyons as trustee for the townsite of Juneau, in the Territory of Alaska, party of the first part, and Emery Valentine of Juneau, in the District ———, and ———, of Alaska, party of the second part, witnesseth:

WHEREAS, said party of the first part has been appointed trustee for said townsite by the Secretary of the Interior, under the provisions of sections 11 and 15 inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes" (26 Stats., 1905), and

WHEREAS, pursuant to said appointment as such trustee, said party of the first part has duly qualified and entered upon the performance of his duties, as such, as provided in said act and the regulations of the Secretary of the Interior, dated June 3, 1891, for his guidance, and

WHEREAS, on the 13th day of October, A. D. 1893, said party of the first part, as such trustee, entered the tract of land upon which the townsite of Juneau is situate being survey No. 1, of public surveys in Alaska, under said act, executed by Geo. W. Garside, United States deputy surveyor, under instructions from the United States marshal, ex-officio surveyor-general of Alaska, bearing date of the 8th day of March, 1892, approved by said United

States marshal, ex-officio surveyor-general, on the 21st day of October, 1892, and

WHEREAS, said trustee has entered said land in trust for the several use and benefit of the occupants thereof, according to their respective interests, and has made survey thereof into lots, blocks, squares, streets, and alleys, and has assessed upon each of the lots in said townsite the sums of money contemplated by the instructions of the Secretary of the Interior, and [39]

WHEREAS, said trustee finds that according to the true spirit and intent of said act that said party of the second part is interested in said townsite and entitled to the premises thereon as hereinafter described, and

WHEREAS, said party of the second part has paid the assessments upon said property amounting to the sum of forty-eight dollars.

NOW, THEREFORE, said party of the first part, as such trustee, by virtue of the power vested in and conferred upon him by the terms of said act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents does grant, convey, and confirm unto the said party of the second part and his heirs and assigns all the following lot, piece, and parcel of land situate in the town of Juneau, and Territory of Alaska, described as follows, to wit:

Lot One (1) in Block three (3) as per the office plat *thereof*.

To have and to hold the same, together with all and singular the tenements, hereditaments and appur-

tenances thereunto belonging, or in anywise appertaining, forever.

IN WITNESS WHEREOF, said party of the first part, as such trustee, has hereunto set his hand and seal on the day and year first above written.

THOMAS R. LYONS, [Seal]

Trustee for the townsite of Juneau, Alaska Territory.

In presence of

T. J. DONOHUE.

ROSE MILLER. [40]

Territory of Alaska.

Be it remembered, that on this 20th day of July, A. D. 1898, before me, a Notary Public, came Thomas R. Lyons to me personally known to be the trustee of said townsite of Juneau, Alaska, and the identical person described in, and whose name is affixed to, the foregoing conveyance as grantor, and he acknowledges the execution of the same to be his voluntary act and deed as such trustee, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal]

JOHN G. HEID, [Seal]

Notary Public. [41]

Exhibit "C" [to Cross-Complaint].

THIS INDENTURE, made this 14th day of July, in the year of our Lord one thousand eight hundred and ninety-eight, by and between Thomas R. Lyons as trustee for the townsite of Juneau, in the Territory of Alaska, party of the first part, and Emery

Valentine of Juneau, in the District ———, and
———, of Alaska, party of the second part, witnesseth:

WHEREAS, said party of the first part has been appointed trustee for said townsite by the Secretary of the Interior, under the provisions of sections 11 and 15 inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," (26 Stats., 1905), and

WHEREAS, pursuant to said appointment as such trustee, said party of the first part has duly qualified and entered upon the performance of his duties, as such, as provided in said act and the regulations of the Secretary of the Interior, dated June 3, 1891, for his guidance, and

WHEREAS, on the 13th day of October, A. D. 1893, said party of the first part, as such trustee, entered the tract of land upon which the townsite of Juneau is situate being survey No. 1, of public surveys in Alaska, under said act, executed by Geo. W. Garside, United States deputy surveyor, under instructions from the United States marshal, ex-officio surveyor-general of Alaska, bearing date of the 8th day of March, 1892, approved by said United States marshal, ex-officio surveyor-general, on the 21st day of October, 1892, and

WHEREAS, said trustee has entered said land in trust for the several use and benefit of the occupants thereof, according to their respective interests, and has made survey thereof into lots, blocks, squares, streets, and alleys, and has assessed upon each of the

lots in said townsite the sums of money contemplated by the instructions of the Secretary of the Interior, and [42]

WHEREAS, said trustee finds that according to the true spirit and intent of said act that said party of the second part is interested in said townsite and entitled to the premises thereon as hereinafter described, and

WHEREAS, said party of the second part has paid the assessments upon said property amounting to the sum of Forty-eight dollars.

NOW, THEREFORE, said party of the first part, as such trustee, by virtue of the power vested in and conferred upon him by the terms of said act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents does grant, convey, and confirm unto the said party of the second part and his heirs and assigns all the following lot, piece, and parcel of land situate in the town of Juneau, and Territory of Alaska, described as follows, to wit:

Lot three (3) in Block three (3) as per the official plat *thereof*.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, forever.

IN WITNESS WHEREOF, said party of the first part, as such trustee, has hereunto set his hand and

seal on the day and year first above written.

THOMAS R. LYONS, [Seal]

Trustee for the Townsite of Juneau, Alaska Territory.

In presence of

JOHN G. HEID.

ALFRED E. MALTBY. [43]

Territory of Alaska.

Be it remembered, that on this 20th day of July, A. D. 1898, before me, a Notary Public, came Thomas R. Lyons to me personally known to be the trustee of said townsite of Juneau, Alaska, and the identical person described in, and whose name is affixed to, the foregoing conveyance as grantor, and he acknowledges the execution of the same to be his voluntary act and deed as such trustee, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal]

JOHN G. HEID, [Seal]

Notary Public for Alaska. [44]

Exhibit "D" [to Cross-Complaint].

THIS INDENTURE, made this 18th day of July, in the year of our Lord one thousand nine hundred and one, by and between Thomas R. Lyons as trustee for the townsite of Juneau, in the Territory of Alaska, party of the first part, and Emery Valentine of Juneau, in the District ———, and ———, of Alaska, party of the second part, witnesseth:

WHEREAS, said party of the first part has been appointed trustee for said townsite by the Secretary

of the Interior, under the provisions of sections 11 and 15 inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," (26 Stats., 1905), and

WHEREAS, pursuant to said appointment as such trustee, said party of the first part has duly qualified and entered upon the performance of his duties, as such, as provided in said act and the regulations of the Secretary of the Interior, dated June 3, 1891, for his guidance, and

WHEREAS, on the 13th day of October, A. D. 1893, said party of the first part, as such trustee, entered the tract of land upon which the townsite of Juneau is situate being survey No. 1, of public surveys in Alaska, under said act, executed by Geo. W. Garside, United States deputy surveyor, under instructions from the United States marshal, ex-officio surveyor-general of Alaska, bearing date of the 8th day of March, 1892, approved by said United States marshal, ex-officio surveyor-general, on the 21st day of October, 1892, and

WHEREAS, said trustee has entered said land in trust for the several use and benefit of the occupants thereof, according to their respective interests, and has made survey thereof into lots, blocks, squares, streets, and alleys, and has assessed upon each of the lots in said townsite the sums of money contemplated by the instructions of the Secretary of the Interior, and [45]

WHEREAS, said trustee finds that according to the true spirit and intent of said act that said party

of the second part is interested in said townsite and entitled to the premises thereon as hereinafter described, and

WHEREAS, said party of the second part has paid the assessments upon said property amounting to the sum of Sixteen dollars.

NOW, THEREFORE, said party of the first part, as such trustee, by virtue of the power vested in and conferred upon him by the terms of said act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents does grant, convey, and confirm unto the said party of the second part and his heirs and assigns all the following lot, piece, and parcel of land situated in the town of Juneau, and Territory of Alaska, described as follows, to wit:

Commencing at a point on the dividing line between lots one (1) and two (2) in Block three (3), 3.6 ft., measured on said line from block "G"; thence running in a northwesterly direction on said line a distance of 96.6 ft. to the dividing line between lot one (1) and two (2) and seven (7) and eight (8) in said Block three (3); thence in an easterly direction on said dividing line a distance of 50 feet to the east corner of said lot two (2) block three (3), thence in a southwesterly direction on the dividing line between lots two (2) and three (3) a distance of 12.6 feet, thence south 60 degrees and 52 minutes west 18.1 ft.; thence south 29 degrees and 8 minutes east 30.3 ft.; thence south 17 degrees and 55 minutes west to place of beginning according to the official survey and plat of said Juneau, Alaska, as executed by G. W. Gar-

side and approved by the trustee of the townsite of Juneau.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, forever.

IN WITNESS WHEREOF, said party of the first part, as such trustee, has hereunto set his hand and seal on the day and year first above written.

THOMAS R. LYONS, [Seal]

Trustee for the Townsite of Juneau, Alaska Territory.

In presence of

J. G. BARBER.

E. J. BROOKS. [46]

Territory of Alaska.

Be it remembered, that on this 18th day of July, A. D. 1901, before me, a Notary Public, came Thomas R. Lyons to me personally known to be the trustee of said townsite of ~~Juneau, Alaska~~, and the identical person described in, and whose name is affixed to, the foregoing conveyance as grantor, and he acknowledges the execution of the same to be his voluntary act and deed as such trustee, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal]

ARTHUR L. LOVETT, [Seal]

Notary Public for Alaska. [47]

United States of America,
District of Alaska,—ss.

I, J. J. McGrath being first duly sworn, on oath say: That I am one of the defendants in the above-entitled action; that I have read the foregoing Answer and know the contents thereof and believe the same to be true.

J. J. McGRATH.

Subscribed and sworn to before me this 3d day of January, A. D. 1910.

[Seal]

JOHN RUSTGARD,
Notary Public for Alaska.

Due service of a copy of the within is admitted this 4th day of Jan., 1910.

J. F. MALONY,
Atty. for Plff.

[Endorsed]: Original No. 613-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath et al., Defendants. Second Amended Answer. Filed Jan. 5, 1910. H. Shattuck, Clerk. By H. Malone, Deputy. Lewis P. Shackleford, Attorney for Defts. Office: Juneau, Alaska. [48]

[Title of Court and Cause.]

**Reply to Answer and Cross-Complaint of J. J.
McGrath.**

Now comes the plaintiff, by his attorneys, and for reply to the second amended answer of the defendant, J. J. McGrath to the first cause of action, says:

1st. For reply to the second defense to said cause

of action being the plea of the statute of limitation of seven years, he denies all and singular the allegations therein contained.

2d. And for reply to the third defense to said cause of action, plaintiff denies all and singular the allegation therein contained.

And for reply to the answer of the defendant to the second cause of action, plaintiff says:

1st. For reply to the second defense, being the plea of the seven years statute of limitation, to the second cause of action, he denies all and singular the allegations therein contained.

2d. And for reply to the third defense, this plaintiff denies all and singular the allegations therein contained.

And for reply to the answer of J. J. McGrath to the third cause of action alleged, this plaintiff says:

1st. For reply to the second defense to said cause of action, being the plea of the seven years statute of limitation, [49] he denies all and singular the allegations therein contained.

2d. For reply to the third defense to said cause of action, this plaintiff denies all and singular the allegations therein contained.

And for reply to the first cross-complaint of the defendant J. J. McGrath, plaintiff denies and alleges as follows:

I.

Referring to paragraph I thereof plaintiff has no knowledge or information concerning same, and he therefore, denies all and singular the allegations in said paragraph contained.

II.

Referring to the second paragraph thereof, he denies all and singular the allegations therein contained.

III.

Referring to the fourth paragraph of said cross-complaint, plaintiff admits that on or about December 3d, 1897, he filed his application with the townsite trustee for the town of Juneau, for a deed to all of Lot 1, in Block 3 of the said town of Juneau, but he denies all and singular the other and remaining allegations in said paragraph contained.

IV.

Referring to the fifth paragraph of said cross-complaint, plaintiff admits that on or about July 13th, 1898, the said townsite trustee executed his deed conveying to the plaintiff all of Lot 1, in Block 3, of the town of Juneau; but he denies all and singular the other and remaining allegations in said paragraph contained.

V.

Referring to paragraph six of said first cross-complaint, plaintiff denies all and singular the allegations therein contained. [50]

VI.

Referring to the seventh paragraph of said cross-complaint, plaintiff admits that on or about January 3d, 1898, the defendant filed his application with the townsite for a deed to the premises attempted to be described in the first part of said paragraph, and he alleges that said application was rejected by the said townsite trustee because said description was

too *indefinite* and uncertain to support a deed; Plaintiff further admits that that defendant thereafter had a surveyor survey the ground or premises claimed by him, and thereafter the said surveyor furnished the defendant with the field-notes of said premises set out in paragraph seven and that thereafter, the defendant filed with the said trustee his application for a trustee's deed to the premises included in said survey. But he denies all and singular the other and remaining allegations in said paragraph contained; and plaintiff alleges:

That he filed a contest before said trustee, protesting against defendant's said application, that a hearing was duly had before said trustee, and after full hearing the premises described in the complaint, and in controversy herein, were expressly excluded from defendant's said application and adjudged to belong to the plaintiff, and said decision has never been reversed, annulled or modified.

VII.

Referring to the eighth paragraph of said cross-complaint, plaintiff admits that on or about January 14th, 1898, and after the decision of the contest mentioned in the next preceding paragraph hereof, the defendant received a deed to a portion of the premises involved in said application of defendant; but plaintiff has no knowledge as to whether the copy of the deed marked Exhibit "A" to the defendant's answer [51] is a correct copy of said deed, and he, therefore, denies the same; and alleges that if the said copy marked Exhibit "A" is a true copy of the original, then the description therein contained

varies from the description of the premises awarded defendant in the decision of the trustee aforesaid in this; that the description contained in said Exhibit "A" embraces a portion of the premises sued for by plaintiff herein while in said decision of said trustee such premises were expressly excluded. And plaintiff denies all and singular the other and remaining allegations in said paragraph contained.

VIII.

Referring to paragraph nine of said cross-complaint, plaintiff admits that his deed to Lot 1, in Block 3 of the town of Juneau, was duly recorded on or about January 14th, 1898; but he denies all the singular the other and remaining allegations in said paragraph contained.

And for reply to the second cause of action for equitable relief of the defendant, J. J. McGrath, plaintiff says:

I.

Referring to the 1st and 2d paragraphs of said second cause of action, plaintiff denies all and singular the allegations contained therein.

II.

Referring to the third paragraph thereof, plaintiff denies the allegation therein made as follows: "And while the defendant was such sole and exclusive occupant of said premises as above set out."

III.

Referring to the fourth paragraph thereof, plaintiff admits that on or about December 3d, 1897, he filed an application [52] with the townsite trustee for the premises described in paragraph 1, of said

second cause of action; but he denies all and singular the other and remaining allegations in said paragraph contained.

And plaintiff further alleges that there was, thereafter, a contest and litigation between the plaintiff and defendant before said townsite trustee, which was duly initiated, tried and determined and the premises described in plaintiff's complaint herein were awarded by said trustee to the plaintiff.

IV.

Referring to paragraph five thereof, the plaintiff admits that on or about July 14th, 1898, the said townsite trustee executed a deed conveying to him all of Lot 3 in Block 3 of the town of Juneau; but he denies all and singular the further and remaining allegations in said complaint contained.

V.

Referring to paragraph six thereof, plaintiff admits that on or about January 3d, 1898, defendant filed his application for a trustee's deed to the premises attempted to be described in the first portion of said paragraph six, but plaintiff alleges that said application was by the said trustee rejected because said description was too indefinite and uncertain to support a conveyance; plaintiff further admits that defendant thereafter procured a surveyor to make a survey of the premises claimed by him, and that such survey was made, and defendant furnished with the field-notes thereof; that on or about the ninth day of December, 1898, the defendant filed his amended application for a deed from said townsite trustee, describing the premises claimed by him in accordance

with the field-notes furnished by said surveyor; plaintiff further admits that said townsite trustee ordered a hearing to determine whether plaintiff or defendant [53] was entitled to a trustee's deed to Lot 2, in Block 3, of said town and how much, if any, each party was entitled to. But plaintiff denies all and singular the other and remaining allegations in said paragraph contained. And plaintiff further alleges that on said hearing, the premises herein sued for and described as portions of Lots 1 and 2 and 3, in Block 3, were by said trustee awarded to the plaintiff.

VI.

Referring to paragraph seven thereof, plaintiff admits that on or about the 14th day of January, 1901, a deed was issued to the defendant by the trustee, pursuant to his decision of said contest between plaintiff and defendant; but he denies all and singular the other and remaining allegations in said paragraph contained.

VII.

Referring to paragraph eight thereof, plaintiff admits that the premises described therein includes all that portion of Lot 3, in Block 3, described in plaintiff's second cause of action, except that portion of the premises described as a portion of Lot 2, in Block 3; and he further admits that his deed of July 14th, 1898, was recorded on July 20th, 1898; but he denies all and singular the other and remaining allegations of said paragraph.

VIII.

Referring to paragraph nine thereof, this plaintiff

admits that pursuant to his decision in the contest between plaintiff and defendant as to the right to the deed to Lot 2, in Block 3, of Juneau, the said trustee did, on or about July 18th, 1901, execute to plaintiff the deed attached to the defendant's answer as Exhibit "D," and that said deed was recorded on July 20th, 1901, in the office of the recorder at Juneau, in Book 13 of Deeds at page 297; but plaintiff denies [54] all and singular the other and remaining in allegations in said paragraph contained.

IX.

Referring to paragraph ten thereof, plaintiff admits that he is relying upon his said deeds as evidence of his title to said premises herein sued for, but he denies all and singular the other and remaining allegations in said paragraph contained.

L. V. RAY and
MALONY & COBB,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

Emery Valentine, being first duly sworn, on oath deposes and says: I am the plaintiff above named. I have read the above and foregoing reply, know the contents thereof and the same is true, as I verily believe.

[Notarial Seal] EMERY VALENTINE.

Subscribed and sworn to before me this the 29th day of January, 1910.

L. V. RAY,
Notary Public in and for Alaska.
Service of the within Reply to Answer of J. J. Mc-

Grath is admitted to have been made by delivery of a copy thereof, this 29th day of January, 1910.

L. P. SHACKLEFORD and
JOHN RUSTGARD,

Attorneys for Defendant J. J. McGrath.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath and S. Hirsch, Defendant. Filed Jan. 29, 1910. H. Shattuck, Clerk. By H. Malone. Reply to Answer of J. J. McGrath. L. V. Ray, Malony & Cobb, Attorneys for Plaintiff. Office: Juneau, Alaska. [55]

[Title of Court and Cause.]

**Plaintiff's Request for Findings of Fact and
Conclusions of Law.**

This cause came on regularly for trial, and thereupon came the plaintiff by his attorney, J. H. Cobb, and the defendants by their attorney, John Rustgard, and all parties announced ready for trial; and all parties in open court waived a jury and agreed to submit all issues of fact as well as of law to the Court. And the Court, having heard the evidence and argument of counsel thereon, makes the following Findings of Fact:

1. The ground in controversy in this action is a part of the town of Juneau, Alaska, which was entered for patent under the townsite laws upon October 13, 1893; the ground in controversy being portions of Lots 1, 2 and 3 in Block 3, and a portion of Lot 1 of Block G, in said town.

2. On the hearing it was expressly stipulated in open Court by counsel for both sides that any errors in description in the pleadings should be considered as amended to conform to the proof, and the case was heard and tried fully upon the merits.

3. Plaintiff in 1897, shortly after the issuance of patent and after the proper posting and publication of notice by the townsite trustee that his office was ready to proceed to the issuance of deeds under the townsite laws, made his [56] application for deeds to all of Lots 1, 2 and 3 in Block 3, according to the official survey of said town, and to the following described portion of Lot 1, in Block G, to wit: "Beginning at a point on the common boundary line between Lot No. 1, in Block No. 3, and Block G, about 2 feet distant Westerly from the southeast corner of said Lot No. 1; thence southerly 33.7 feet to a point on the south boundary line of said Block G 51.8 feet easterly from the west corner of said Block G; thence westerly along the south boundary line of said Block G 51.8 feet to the westerly corner of said Block; thence along the common boundary line Lot No. 1, in Block No. 3, and Block G, to the point of beginning.

4. On the 3d day of January, 1898, and before the issuance of any deed to the plaintiff, the defendant J. J. McGrath, made his application before the townsite trustee for a deed to a piece of ground described as follows, to wit: "That certain piece or parcel of land situate, lying and being between Lots 2 and 3, in Block 3, as per Hannan's plot, said piece or parcel of land fronting on the waterfront of said Town of Juneau and being 60 feet in width on said waterfront

street and extending back a distance of 100 feet and being 24 feet in width on or at the rear end or line of said described piece or parcel of land.”

5. The above and foregoing description is an imperfect description and is incapable of identification on the ground, and the townsite trustee, proceeding regularly upon the application of the plaintiff, thereafter on or about the 14th day of July, 1898, issued a deed to plaintiff, conveying to him all of Lot 1, in Block 3, and all of Lot 3, in Block 3, and the defendant never filed any contest against the application of the plaintiff for said Lots 1 and 3, in Block 3. [57]

6. The defendant, McGrath's, application, as above made, was contested by the plaintiff, Valentine, before the townsite trustee and the contest was heard upon the plaintiff's application for the premises in Block G, described above, and his application for Lot 2, in Block 3, and the defendant, McGrath's, application for the premises attempted to be described in his application; and on December 9, 1898, the defendant was required by the trustee to file, and did file, an amended application, which is set out in the defendant, McGrath's, cross-complaint. Said contest was regularly heard and voluminous evidence introduced and, after a full hearing, the plaintiff, Valentine, was awarded the following described portion of Lot 2, in Block 3, to wit: "Commencing at a point on the dividing line between Lots One (1) and Two (2), in Block Three (3) 3.6 feet measured on said line from Block G; thence running in a north-westerly direction on said line a distance of 96.6 feet to the dividing line between Lots One (1) and Two

(2) and Seven (7) and Eight (8), in said Block Three (3); thence in an easterly direction on said dividing line a distance of 50 feet to the east corner of said Lot Two (2), in Block Three (3); thence in a westerly direction on the dividing line between Lots Two (2) and Three (3), a distance of 12.6 feet; thence south $60^{\circ} 52'$ 18.1 feet, thence south $29^{\circ} 8'$ east 30.3 feet; thence south $17^{\circ} 55'$ west to place of beginning, according to the official survey and plat of said Juneau, Alaska, as executed by G. W. Garside and approved by the trustee of the townsite of Juneau." Said trustee made his deed to Valentine for said premises on the 18th day of July, 1901, and on the 18th day of July, 1901, he executed to Emery Valentine his [58] deed for the following described portion of Lot 1, in Block G, to wit:

Beginning at the southwest corner of Lot One (1) in Block Three (3); thence in a southeasterly direction on the Northerly line of Front Street a distance of 51.8 feet; thence north $17^{\circ} 55'$ west to the dividing line between said Block Three (3) and Block G. Thence in a southwesterly direction on the dividing line between said Block Three (3) and Block G to the place of beginning. The defendant, McGrath, was awarded all the remaining portion of Lot No. 2, in Block 3, and a portion of Lot 1, in Block G, not in controversy in this suit. The plaintiff, Valentine, appealed from said decision of the townsite trustee, but the decision of the trustee was affirmed on appeal by the Secretary of the Interior.

7. The property in controversy in this suit is more particularly shown upon the plat hereto attached

and made a part hereof, and being the portions colored in red on said plat except that portion so colored in Block "G"; and said premises are described by field-notes as follows:

First: A portion of Lot One (1) in Block No. Three (3).

Beginning at the Southeasterly corner of said Lot No. One (1) at the Southwesterly corner of Lot No. Two (2) in Block No. Three (3); Thence N. 44° W. on the dividing line between said Lots One and Two in Block Three a distance of 3.3 feet; thence Southerly 3.3. feet to a point on the south boundary line of said Lot One in Block Three, 1.5 distant from the Southeast corner of same, identical point of beginning; thence along the southerly boundary line of said Lot One in Block Three to the place of beginning.

Second: A portion of Lot No. Two (2) in Block No. Three (3), and a portion of Lot No. Three (3) in Block No. Three (3).

Beginning at a point on the common boundary line between said Lots Nos. 2 and 3 Block 3, 11.1 distant from the NE. corner of Lot 2, and the NW. corner of Lot 3; Thence N. $59^{\circ} 9' E.$ 10 feet more or less to the corner of the building occupied by the defendants; thence S. $30^{\circ} 31' E.$ 24.2 feet to the SE. corner of said building; thence S. $59^{\circ} 9' W.$ 2.4 feet more or less to the intersection of the common boundary line between said Lots 2, and 3 in Block 3; [59]

Thence N. 44° W. along said line 23.3 feet to a point on said line 12.6 feet distant from the NE. corner said Lot 3 in Block 3;

Thence S. $60^{\circ} 52' W.$ 18.1 feet; thence S. $29^{\circ} 8' E.$ 30.3 feet;

Thence No. $30^{\circ} 51' W.$ 24.2 feet to the corner of the building occupied by the defendants; thence N. $59^{\circ} 9' E.$ along the north line of said building to the place of Beginning.

Third: A portion of Lot No. Three (3) in Block No. Three (3).

Beginning at a point on the common boundary line between Lots 2 and 3 in Block No. 3 29.6 feet distant from the SW. corner of said Lot 3, and the SE. corner of said Lot 2; thence N. $70^{\circ} 6' E.$ 3.8 feet; thence N. $19^{\circ} 54' W.$ 3.3 feet; thence S. $70^{\circ} 6' E.$ 3.8 feet; thence N. $19^{\circ} 54' W.$ 3.3 feet; thence S. $70^{\circ} 6' W.$ 5.2 feet to the intersection of said line between said Lots 2 and 3; thence S. $44^{\circ} E.$ along said line to the place of Beginning.

8. The failure of the defendant, McGrath, to file a contest over the application of the plaintiff for deeds to Lots 1 and 3, in Block 3, was due to no act or omission on part of the plaintiff but appears to have been due solely to the negligence of the defendant, McGrath.

9. The contest between McGrath and the plaintiff, Valentine, over Lot 2, in Block 3, was fairly and fully heard, and there is no evidence of a mistake on part of the trustee in the conclusions arrived at.

10. The Court further finds that there is a two-story building costing about Four Thousand Dollars (\$4,000.00) standing upon the defendant's ground, and which encroaches upon and covers that portion of Lot 1, in Block One (1) in controversy herein; that at the time of the erection of the building no notice was given by the owner of this small encroachment

but the building was permitted to be completed without objection. Under these circumstances the Court finds it inequitable to award this ground to the plaintiff and allow him to chop a hole in the side of a valuable building, and materially damage and disfigure it, but plaintiff is entitled to recover the value of this piece of ground, and upon the payment of such value by the defendant he is entitled to an injunction against plaintiff, or [60] a conveyance.

11. The rental value of that portion of the ground awarded plaintiff is Ten Dollars (\$10.00) for the entire time it has been withheld by the defendant.

12. The defendant, S. Hirsch, is a tenant of McGrath and holding under him, and has no other interest in the premises.

From the above and foregoing facts, I conclude as matter of law—

1. That plaintiff is the legal and equitable owner of the premises in controversy, holding the same under patent from the United States to the townsite trustee and deeds from the townsite trustee to himself, and is entitled to recover the same with nominal rental thereof, to wit \$10.00.

2. The defendant, McGrath, is concluded by the award of the townsite trustee from any claim in the premises in controversy.

3. The plaintiff is holding from and under the United States and the seven years statute of limitations plead by the defendant is not applicable, since it would in effect be to plead the same against the United States. I further conclude that the defendant, McGrath, is not holding the premises in contro-

versy under any color of title.

4. The ten years statute of limitations plead by the defendant, McGrath, did not run at the time of the beginning of this action since the statute did not begin to run against the plaintiff until he received his deeds. The plaintiff is entitled to judgment against both defendants for restitution of the premises in controversy, excepting that portion of Lot One (1) in Block One (1), and against McGrath for the rental value thereof, amounting now [61] to the sum of Ten Dollars (\$10.00); and a judgment that the defendant, McGrath, take nothing by his cross-complaints.

5. It is further ordered that the plaintiff be and he is hereby enjoined from entering upon that portion of Lot One (1) in Block One (1) described in the first cause of action and in these findings, but will be allowed sixty (60) days within which to institute a suit for its value and damages, if any, to the remainder of the tract, which issue may be proved in this suit, and jurisdiction retained for that purpose, or an independent suit be instituted by plff., as plaintiff may elect, and the injunction to remain in effect until sixty (60) days after the return unsatisfied of an execution upon any money judgment that may be recovered and the further order of the Court.

6. Each party will pay their own costs herein.
Let a judgment enter accordingly.

Dated, June 16th, 1910.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Original No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath and S. Hirsch, Defendants. Findings of Fact and Conclusions of Law. Filed Jun. 16, 1910. H. Shattuck, Clerk. By —————, Deputy. Malony & Cobb, Attorneys for Plff. Office: Juneau, Alaska. [62]

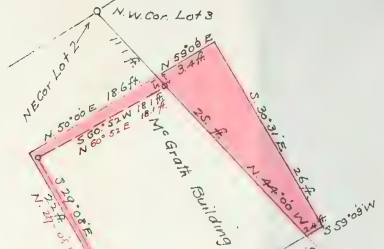
Var. 30.00' E.

Seward

N 44.00' W

Street

Reference
 Red - Conflict McGrath with Valentine
 Red ink - McGrath Lines and courses
 Scale 10 feet = 1 inch



(I.1)

(B.3)

(I.2)

(I.3)

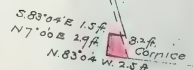
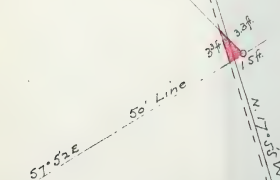
Stairway



between Blocks 8 and 9

(B.9)

McGrath Building



Platform

Front

Street

N 83° 04' W

60.5 ft

S 16° 45' E

8 ft

100 ft

50 ft

50 ft

10 ft

100 ft

100 ft

50 ft

50 ft

50 ft

50 ft

50 ft

50 ft

[]

Cou
Val
Def
Law

Plff.

[Title of Court and Cause.]

Judgment.

THIS CAUSE came on to be heard, and thereupon came the plaintiff by his attorneys, and the defendants by their attorneys, and all parties announced ready for trial and thereupon all parties in open court expressly waive a jury and agree to submit all questions of fact as well as of law to the Court; and the Court having heard the evidence and argument of counsel thereon, and having heretofore filed findings of fact and conclusions of law herein, now upon motion of the plaintiff for judgment upon such findings and conclusions;

It is considered by the Court and so ORDERED AND ADJUDGED that the plaintiff, Emery Valentine, do have and recover of and from the defendants, J. J. McGrath and S. Hirsch, the possession of the following described property, to wit: Situated in the District of Alaska, and in the Town of Juneau, and being part of Lot No. 2 in Block 3, and a part of Lot No. 3 in Block No. 3 of the Town of Juneau, Alaska, and bounded as follows: Beginning at a point on the common boundary line between said Lots Nos. 2 and 3 in Block 3 11.1 feet distant from the NE. corner of Lot No. 2 and the NW. corner of Lot No. 3; thence N. $59^{\circ} 9' E.$ 10 feet more or less to the corner of the building occupied by the defendants; thence S. $30^{\circ} 31' E.$ 24.2 feet to the SE. corner of said [63] building; thence S. $59^{\circ} 9' W.$ 2.4 feet more or less to the intersection of the common boundary line between said Lots Nos. 2 and 3 in Block No. 3; thence No. 44°

W. along said line 23.3 feet to a point on said line 12.6 feet distant from the NE. corner of said Lot No. 2 in Block No. 3; thence S. $60^{\circ} 52'$ W. 18.1 feet; thence S. $29^{\circ} 8'$ E. 33.3 feet; thence N. $30^{\circ} 51'$ W. 24.2 feet to the corner of the building occupied by the defendants; thence N. $59^{\circ} 9'$ E. along the north line of said building to the place of beginning.

ALSO the following portion of said Lot No. 3 in Block No. 3: Beginning at a point on the common boundary line between said Lots Nos. 2 and 3 in Block No. 3, 29.6 feet distant from the SW. corner of said Lot No. 3 and the SE. corner of said Lot No. 2; thence N. $70^{\circ} 6'$ E. 3.8 feet; thence $19^{\circ} 54'$ W. 3.3 feet; thence S. $70^{\circ} 6'$ W. 5.2 feet to the intersection of said line between said Lots Nos. 2 and 3; thence S. 44° E. along said line to the place of beginning.

It is **FURTHER ORDERED AND ADJUDGED** that the plaintiff, Emery Valentine, do have and recover of and from the defendant J. J. McGrath the sum of Ten Dollars (\$10.00), with interest thereon from the date hereof at the rate of eight per cent (8%) per annum;

It is **FURTHER ORDERED** that the parties hereto respectively pay their own costs herein;

It is **FURTHER ORDERED, ADJUDGED AND DECREED** that the plaintiff, Emery Valentine, be and he is hereby enjoined from claiming or entering into possession, or attempting to enter into possession of the following described portion of Lot No. 1 in Block No. 3 of the said town of Juneau, to wit: Beginning at the southeasterly corner of said Lot No. 1 and the southwesterly corner of Lot No. 2 in

Block No. 3, thence N. 44° W. on the dividing line between said Lots Nos. 1 and 2, a [64] distance of 3.3 feet; thence southerly 3.3 feet more or less to a point on the south boundary line of said Lot No. 1, 1.5 feet distant from the southeast corner of the same; thence along the southerly boundary line of Lot No. 1 in Block No. 3, to the place of beginning;

It is FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff may at any time within sixty (60) days from the date hereof file a supplementary complaint herein alleging the value of the premises last described, and the damage, if any, to the rest of the plaintiff's premises by the awarding of the same to the defendant McGrath, or, within the said period, may file another action to recover such value and damages, and, upon issue joined thereon, the plaintiff shall be awarded the value of the said premises, whereupon the injunction herein granted to the defendant McGrath shall be made perpetual, and jurisdiction is retained of the case herein for the purpose of determining said issue, if the plaintiff shall elect to try the same in this suit.

It is FURTHER ORDERED that the plaintiff, Valentine, may have a writ of restitution for the premises herein awarded to him and execution for the moneys awarded.

Dated this the 21st day of June, 1910.

EDWARD E. CUSHMAN,

Judge.

Defendant McGrath excepts. Exception allowed.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath and S. Hirsch, Defendants. Judgment. Filed Jun. 21, 1910. H. Shattuck, Clerk. By H. Malone, Deputy. Malony & Cobb, Attorneys for Plff. Office: Juneau, Alaska. [65]

[Title of Court and Cause.]

Statement of Evidence and Bill of Exceptions.

Be it remembered, that the above-entitled cause came on duly and regularly to be heard on Friday, the 18th day of March, 1910, before the Honorable Edward E. Cushman, Judge of said Court:

The plaintiff herein being represented by his attorneys and counsel, Messrs. Malony & Cobb:

The defendants herein before represented by their attorneys and counsel, L. P. Shackleford, Esq., and John Rustgard, Esq.:

An opening statement was made to the Court on behalf of the plaintiff by Mr. Cobb and an opening statement on behalf of the defendants by Mr. Rustgard:

Whereupon the following proceedings were had and done: [66]

[Testimony of Emery Valentine, the Plaintiff, in His Own Behalf.]

EMERY VALENTINE, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. Emery Valentine.

Q. Where do you reside? A. Juneau, Alaska.

Q. How long have you resided here?

A. Twenty-three years.

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. Are you a property owner in Juneau?

A. Yes, sir.

Q. Just state to the Court the extent or experience you have had in renting property since you have been in Juneau, either for yourself or other people?

A. Why, I have been renting a great deal of property since I have been here and collected rentals as much as a thousand dollars per month at times on my own property.

Q. Different tracts of property?

A. Different tracts of property, yes, and as agent for other people in the collection of rents.

Q. You know the reasonable rental value of property in Juneau? A. I think I do.

Q. I want you to state what in your best judgment would be the reasonable rental value of the property belonging to you that is included in your deeds that is encroached upon by the defendant McGrath's possession?

(Testimony of Emery Valentine.)

(Question withdrawn.)

Q. You know where the property in controversy in this city is? [81] A. I do.

Q. Do you know the reasonable rental value of property situated where this is, that section of the town?

A. I think I do; I have rented it there for a number of years or for a good many years.

Q. What has been the reasonable rental value per front foot, along on Front Street there?

A. I rented this part out here on Seward Street (indicating)—

Q. Corner Seward and Front?

A. All of the front part of Lot 1; I rented that at 75¢ per foot per month and this part down here (indicating) I rented that at a dollar per month, and this part (indicating) I had all of this leased out for a number of years.

Q. What then would be in your judgment the value, the monthly rental value, of that little jog there in Lot 1, Block G, and state to the Court further just what you base it upon?

A. I would base the other at 75¢ per foot per month, that is as low as I have rented any of that ground out there.

Q. That occupies something like 2 feet?

A. A foot and a half.

Q. And you ask a dollar for it? A. Yes, sir.

Q. State in what way that interferes with the rest.

A. We couldn't rent such a small place; we couldn't run over here; we were offered a big sum

(Testimony of Emery Valentine.)

of money to build a place here for a restaurant, there where the ground conflicts.

Q. You really have been deprived then of the use of the front along here (indicating) extending the depth of that jog? A. Yes, sir.

Q. Now, how long has the plaintiff been in possession of that, [82] was he in possession of it in May, 1901, six years before the beginning of this suit?

A. Yes, sir.

Q. And has been in possession ever since?

A. Yes, sir.

Q. What then is your estimate of the value, of the rental value per month, of that piece of ground that the plaintiff has deprived you of possession in Lot 1 Block G? A. I said 75¢ per front foot.

Q. I am asking you about that jog, what that is worth?

A. Of course, that interferes as I stated from putting this building here and running it back—it interferes with it that much that I couldn't put the building there that I recently had an offer for. I consider taking out that much the same as taking it along because it deprives me of the whole length of the lot there.

Q. Then you say it was worth at least one dollar a month during that time? A. Yes, sir.

Q. Now, what is the reasonable rental value of that portion of the ground that is covered by McGrath's building that is in your lots, in Lot 2 and Lot 3 in Block 3, that is that collar-shaped piece of ground at the back end of the McGrath building?

(Testimony of Emery Valentine.)

A. That piece of ground occupied by the building is worth about \$15 a month; the building is, I guess, nearly half on my ground.

Q. Well, from your knowledge of it what would you say was the reasonable rental value of the part of the ground covered?

A. That is my part of the ground covered? [83]

Q. Yes.

A. I think about half of \$15, about \$7.50 per month.

Q. Now, in regard to that little jog there on Lot 3, about two-thirds of the way down from the northerly end of it, that is a piece of ground $31\frac{1}{2}$ feet wide by 5 feet—what is the rental value of that?

A. That stands just about the same as this part because it deprives me of the use of this front part of Lot 3; I would have to come out way around that thing there,—that would run into the hotel back here.

Q. And it really prevented you from building there?

A. Yes, it prevented me using Lot 3 there as I wanted to.

Q. You think a dollar per month is a reasonable rental value for that?

A. I would rather have it than have one dollar per month a good deal.

Cross-examination.

(By Mr. RUSTGARD.)

Q. You think it is worth about a dollar per month to McGrath to extend his corners that much on your ground? As shown on Defendant's Exhibit 1?

(Testimony of Emery Valentine.)

A. I don't understand.

Q. This projection shown on Defendant's Exhibit 1, marked "Cornice," that in fact represents the cornice of McGrath's building?

A. This part here of Lot 1?

Q. I refer to the cornice—what do you consider it worth to have the right or permission to extend that cornice over on the property as it is shown?

A. It would be just the same as that if I could use that. [84]

Q. Answer my question—what would you say was the rental value of that?

A. I don't know what the cornice is worth there. I never leased out ground for a cornice.

Q. What in your estimation is that worth?

A. I am not going to estimate because I never rented it out for that.

Q. Then, you don't know the rental value of that?

Q. I wouldn't put any rental value with the cornice hanging over there, no.

Q. Did you make a statement as to what the rental value was on that part of the southeast corner of Lot 1, Block 3 covered by the McGrath building?

A. Yes, what I had always got for that ground.

Q. How much?

A. About 75¢ per front foot.

Q. How much is that building there on your ground?

A. I am not a surveyor; you will have to ask the surveyor for that.

Q. What do you base your estimate on when you

(Testimony of Emery Valentine.)

say it is worth 75¢ a month?

A. Because I said that was what I had always rented that ground for and that I had rented it at one time—the whole thing was rented out—

Q. For 75¢ per front foot? A. Yes, sir.

Q. Have you ever rented anything by the square foot?

A. By the front foot, this and that (indicating).

Q. Do you charge up for the rental value of that corner as much as if the building extended over on your property [85] clear through to the rear?

A. It deprives me of that much.

Q. That is the theory on which you base your estimate of the value? A. Yes, sir.

Q. You have a stairway right there?

A. Yes, sir.

Q. Right along the wall of the McGrath building?

A. Yes, sir.

Q. And there is a distance of about three and one-half feet between the McGrath building and your building to the west of it? A. Yes, sir.

Q. Approximately? A. Yes, sir.

Q. (By the COURT.) I understand there is an open stairway runs up between the two buildings?

A. On account of his being over on my line my stairway is so very narrow that I can't *even the* upstairs in that building.

Q. How wide is that stairway?

A. About 2 feet at the top.

Q. Your stairway is built flush up against the McGrath building?

(Testimony of Emery Valentine.)

A. Right up against the McGrath building, yes.

Q. How far to the front does your stairway extend along the McGrath building? A. I don't know.

Q. Does it come underneath this cornice?

A. I don't know; I never measured that part of it, I don't know how far near the front it extends.

[86]

Q. Did you testify that the space shown on Defendant's Exhibit 1 as being encroached upon by the McGrath house in the rear part was worth \$15 a month,—what did you say the rental value was of the ground encroached upon by McGrath's house, that is in the rear of the property?

A. You mean my ground?

Q. Yes, what you claim as yours?

A. \$7.50 per month for that; for my part.

Q. You have got a lot of vacant ground here on Lot 3? A. Yes, sir.

Q. How much is that, \$7.50 per month?

A. Because I can't use it on account of that, I couldn't build the sidewalk through from this alley way back into the Central Hotel on account of that, I couldn't build anything because it is cut out.

Q. Do you rent any of this property back here (indicating)? A. Yes, sir.

Q. What do you rent?

A. I have a couple of cabins in there?

Q. What do you get for those cabins?

A. \$5.00 a month.

Q. Cabin and all? A. Yes.

Q. When you figure the rental value of this prop-

(Testimony of Emery Valentine.)

erty do you figure on renting the house or is that only the ground rent?

A. I figure the ground as worth about that much.

Q. The ground alone? A. Yes, sir.

Q. How long have those buildings been there?

[87] A. Which ones?

Q. The rear building, to begin with?

A. This residence of McGrath?

Q. Yes.

A. I don't know, it was there in 1886.

Q. How long has the front building been where it now is?

A. I couldn't tell, I don't know how long it has been there.

Q. Been there twenty years?

A. I said I couldn't tell; it is there, I am satisfied of that, I see it every day.

Q. It may have been there twenty years, it may have been built in 1890, for all you know?

A. I don't know,—it wasn't built at that time, I am quite sure it was built later than that.

Q. How much later?

A. I can't tell you exactly, I won't say what time it was built there.

Q. State approximately to the Court.

A. You have the time there.

Mr. COBB.—We object to this as not proper cross-examination.

Objection sustained.

Plaintiff rests. [88]

[Order Allowing Bill of Exceptions, etc.]

The foregoing statement of evidence and bill of exceptions having been by me examined and found to be true and correct and to contain all the evidence adduced and all the proceedings had upon the trial in the above-entitled cause, the same is hereby allowed, ordered filed and made a part of the record herein.

I further certify that a bill of exceptions identical with the foregoing was filed by the defendant, J. J. McGrath, in the above-entitled cause, in the above-entitled court and division, on the 21st day of June, 1910; that a short bill of exceptions was filed by the plaintiff in the above-entitled cause, in the above-entitled court and division, on the 22d day of July, 1910; that the attorneys for plaintiff and defendant reside in the First Division of the District of Alaska; that from the 20th day of June, 1910, to the first day of January, 1911, the undersigned Judge was absent from the First Division of the said district holding various terms of court in the Third Division of said district; that about the first day of January, 1911, said Judge returned to the First Division; whereupon the settling of the two bills of exception filed as aforesaid was called up; that thereupon the attorney for the defendant McGrath announced that such defendant had abandoned his appeal and that he would withdraw the bill of exceptions theretofore filed; that J. H. Cobb, attorney for the plaintiff, announced that he would press his bill of exceptions for settlement at that time; that thereafter, about the tenth day of January, 1911, the undersigned

Judge left the First Division, District of Alaska, and returned to the Third Division, where he remained until about the 25th of April, at which date he returned to the First Division; that on or about May 29th the attorney for plaintiff called up for settlement his short bill of exceptions; that upon the Court [340] announcing that the certificate prepared by the plaintiff to the effect that the short bill of exceptions contained all the material evidence could not be signed, said counsel asked to have the defendant's bill settled, upon which the defendant objected and the Court granted the defendant permission to withdraw his theretofore filed bill, which was done; that thereafter, upon this third day of June, 1911, the plaintiff tendered the foregoing bill of exceptions.

EDWARD E. CUSHMAN,

Judge.

Dated at Juneau, Alaska, this 3d day of June, 1911.
[341]

United States of America,
District of Alaska,—ss.

I, Jno. R. Winn, one of attorneys for defendants do hereby certify that the above and foregoing is a true, full and correct copy of the original Bill of Exceptions herein.

L. P. SHACKLEFORD,
JNO. R. WINN,
Of Attorneys for Defendant.

[Endorsed]: Copy. No. 613-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath and S. Hirsch, Defendants. Bill of Excep-

tions and Statement of Evidence. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. Lewis P. Shackelford, Attorney for Defendants. Office: Juneau, Alaska. [342]

[Title of Court and Cause.]

Petition for Writ of Error.

Emery Valentine, plaintiff in the above-entitled and numbered cause, feeling himself aggrieved by the decision and judgment of the Court, rendered herein on the 21st day of June, 1910, comes now, by Malony & Cobb, his attorneys, and petitions the Court for an order allowing a writ of error to be prosecuted to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under the statute in that behalf made and provided, and also that the amount of security for costs on said writ of error be fixed.

MALONY & COBB,

Attorneys for Emery Valentine.

[Order Allowing Writ of Error and Fixing Amount of Security for Costs.]

The writ of error prayed for in the above and foregoing petition is allowed, and the amount of security for costs is fixed at the sum of Two Hundred and Fifty Dollars.

Dated this 3 day of June, 1911.

EDWARD E. CUSHMAN,

Judge of the District Court for Alaska Before
Whom Said Cause was Tried.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath et al., Defendants. Petition for Writ of Error. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. Malony & Cobb, Attorneys for Plff. Office: Juneau, Alaska. [343]

[Title of Court and Cause.]

Assignment of Errors.

Now comes Emery Valentine, plaintiff in error, and assigns the following errors committed by the Court below in the trial and rendition of the judgment in the above-entitled and numbered cause, upon which he will rely in the Appellate Court.

First: The Court erred in not awarding to the plaintiff, Emery Valentine, that portion of Lot No. 1, in Block G, of the town of Juneau, described in the third cause of action in the complaint, and in the second amended answer of the defendant McGrath.

Second: The Court erred in not awarding to the plaintiff, Emery Valentine, that portion of Lot No. 1 in Block No. 3 of the town of Juneau, described in the 1st cause of action in the complaint; and further erred in awarding the same to the defendant, McGrath, conditioned upon his paying any judgment that might be recovered against him for the value of said premises, together with damages for withholding the same in any suit that said Emery Valentine might bring within sixty days against the said McGrath.

Third: The Court erred in not awarding to the plaintiff, Emery Valentine, the sum of \$10.00 per month from May 1st, 1901, to the time of trial, as rentals on the property in controversy.

Fourth: The Court erred in adjudging that each party pay their own costs, and in not adjudging that plaintiff recover costs of the defendants.

And for said errors, the plaintiff in error, Emery Valentine, prays that said judgment be reversed and the cause [344] remanded with instructions as to this Court may seem proper.

J. H. COBB,

Attorneys for E. Valentine Pltff. in Error.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath et al., Defendants. Assignments of Error. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. Malony & Cobb, Attorneys for Plff. Office: Juneau, Alaska. [345]

[Title of Court and Cause.]

Bond on Writ of Error.

Know all men by these presents that we, Emery Valentine as principal, and R. P. Nelson as surety, are held and firmly bound unto J. J. McGrath and S. Hirsch, defendants above named, in the sum of Two Hundred and Fifty Dollars, to be paid to the said J. J. McGrath and S. Hirsch, their executors or administrators, to the payment of which sum, well and truly to be made, we hereby bind ourselves, our and each of our heirs executors and administrators,

jointly and severally, firmly by these presents.

Whereas the above-named plaintiff, Emery Valentine, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of the District Court of Alaska, Division No. 1, in the above-entitled cause.

Now therefore, the condition of the above obligation is such that if the above-bound Emery Valentine, shall prosecute said writ to effect, and answer all costs and damages if he shall fail to make good his plea, then *then* this obligation shall be null and void; otherwise to remain in full force and virtue.

Witness our hands this the 1st day of June, 1911.

EMERY VALENTINE.

R. P. NELSON.

The above and foregoing bond is approved, this the 3d day of June, 1911.

EDWARD E. CUSHMAN,

Dist. Judge. [346]

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath et al., Defendants. Bond of Writ of Error. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. J. H. Cobb, Attorneys for Plff. Office: Juneau, Alaska. [347]

[Title of Cause.]

Order Extending Time to File Transcript.

Upon application of counsel for plaintiff, the time for filing the transcript of the Record in the Appel-

late Court in this cause is hereby extended to and including August 15th, 1911.

Dated June 3d, 1911.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plff., vs. J. J. McGrath et al., Defts. Order Extending Time to File Transcript. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. J. H. Cobb, Atty. for Plff. [348]

[Title of Court and Cause.]

Decision of Court.

Appearances:

MALONY & COBB,

For Plaintiff.

L. P. SHACKLEFORD,

JOHN RUSTGARD,

For Defendants.

This is a suit by plaintiff against the defendant J. J. McGrath and his tenant for the recovery of the possession of real property and damages for its detention.

The plaintiff filed his complaint in this court, April 26, 1907, alleging in three causes of action:

1. That the plaintiff is the owner of Lot 1, Block 3, in the town of Juneau, Alaska.
2. That plaintiff is the owner of Lots 2 and 3 in said block.
3. That plaintiff is the owner of a portion of Lot

1 in Block G described in said complaint.

That defendants in 1901 wrongfully ejected plaintiff from a portion of the several tracts above described and alleging the rental value of such portion.

The defendant McGrath answered in said cause, denying the cause of action in plaintiff's complaint and interposing an affirmative defense alleging the entry of the townsite of Juneau, the 13th day of October, 1893, and patenting of the townsite September 4th, 1897; that in 1882 defendant's [349] grantor entered and took possession of certain of said lands, including all the land claimed by plaintiff and defendant; that defendant acquired these lands from him December 9th, 1889, and remained and was in the actual occupation and exclusive possession on the date of the entry of the townsite, making valuable improvements thereon; that the trustee of said townsite gave notice pursuant to the regulations of the Secretary of the Interior that he would, on the 15th day of November, 1897, set apart lots and parcels of land in said townsite to the occupants thereof; and thereafter on the 20th day of July, 1898, the plaintiff falsely and fraudulently represented to the trustee that he and his grantors were the owners, entitled to the possession of the lands described in plaintiff's complaint; and the trustee on said date did "actually hear and determine on said false and fraudulent statements the said questions of said occupancy and ownership of said lots and acting under the belief that said statements were true, executed to the plaintiff a trustee's deed" conveying to plaintiff Lots 1 and 3, in Block 3, and that

portion of Lot 1, in Block G, described in the complaint; that upon a contest between plaintiff and defendant before the trustee concerning Lot 2 in Block 3 the trustee on the 28th day of March, 1899, made a decision awarding the defendant a portion of said lot; that upon the plaintiff's appeal said decision was affirmed by the Commissioner of the General Land Office, and the Secretary of the Interior and the trustee deeded the same to defendant; the defendant prays to be decreed the owner, entitled to the possession of all the land in dispute, and further prays that the plaintiff be compelled to convey to the defendant the portions of Lot 1 and 3 in Block 3, and Lot 1 in Block G included within the boundaries of the property conveyed to him as alleged. [350]

Upon the motion of plaintiff for judgment on the pleadings judgment was entered in this court in 1908 decreeing that plaintiff recover from the defendant possession of the southeast corner of Lot 1, Block 3, being a triangular piece of ground $3\frac{1}{3}$ feet by $3\frac{1}{3}$ feet by $1\frac{1}{2}$ feet, and two parcels of ground in Lot 3, Block 3, awarding the plaintiff damages for the detention of said property in the sum of One Thousand One Hundred and Twenty-eight Dollars (\$1128), said judgment upon motion of plaintiff to dismiss the third cause of action as affecting the land in Lot 1 in Block G it was so adjudged. Upon writ of error to the Court of Appeals sued out by the defendant said cause was reversed and remanded on account of the judgment being given for the amount of damages prayed in the complaint over the

general denial in defendant's answer.

167 Federal 473.

Upon the coming down of the mandate to this court the defendant McGrath interposed a farther amended answer, which in addition to general denials of the allegations of plaintiff's complaint pleads to each of said causes of action the defense of seven years actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of the premises in controversy immediately prior to the commencement of the action, under color and claim of title.

2. Alleging that neither the plaintiff nor any of his ancestors, predecessors or grantors were seized or possessed of the premises described in said causes of action at any time within ten years before the commencement of this action.

And by way of cross-complaint, for the purpose of securing equitable relief against the plaintiff, defendant alleges as in his former answer his purchase on the 9th day of [351] December, 1889, of that portion of Lot 1, Block 3, in dispute in the southeast corner of said lot, describing it as being 3.6 feet by 3.6 feet by 11½ feet, alleging the entry of the townsite as above by the trustee and that at the time of said entry the defendant was the sole owner and sole and actual occupant of the premises described; that nevertheless on the 3d day of December, 1897, while defendant was in such possession and occupancy and had permanent and valuable improvements thereon, the plaintiff falsely and fraudulently, with intent to deceive and mislead the trustee into believing that

plaintiff was and had been prior to and at the time of the entry the actual occupant of said premises and entitled to a deed therefor and with the intent of cheating and defrauding defendant and depriving him of his property, represented that he was at the time of entry the actual occupant and owner of said premises and the whole thereof, and by reason of such representations, the trustee did, on July 13, 1898, deed all of Lot 1, Block 3, to plaintiff; that defendant had no notice or knowledge of the application or the fact that a deed had been issued for a long time thereafter and alleges that no time has ever been fixed by the Secretary of the Interior or any other officer under him within which parties are required to file their applications for deeds with the trustee and alleging that no such notice had been given by the trustee; that said deed is wholly void and constitutes a cloud upon defendant's title; that on January 18th, 1898, the defendant made application to the trustee for the premises owned and occupied by the defendant in said blocks; that it was erroneously described as lying between Lots 2 and 3, in Block 3, whereas these lots joined, the one upon the other; that defendant upon discovering this error employed a surveyor who surveyed the land claimed by him and defendant's application [352] for deed was amended to conform to said survey; that said survey was erroneous in that it failed to disclose defendant's occupancy of that portion of Lot 1, Block 3, described; that at the time of this survey the defendant had erected and maintained a large two-story store building on said premises,

and that the westerly side wall of said building stands upon, includes and covers all of said premises; that this could be seen without difficulty upon inspection of the premises, but that the lines and corners of the various lots into which the townsite had been divided by the survey of the townsite trustee were not marked and the boundaries of the various lots in said townsite could not be determined by anyone except a surveyor with the proper instruments for the purpose, and even then with the greatest difficulty; that the surveyor employed by the department failed to find the lines and corners of Lot 1, Block 3, and failed to disclose in his survey that said building covered said portion of said lot; that on the 14th day of January, 1901, pursuant to such application the trustee executed a deed intending to convey to the defendant the premises described in said cross-complaint.

Concerning the second cause of action, the cross-complaint alleges color and claim of title since the 9th day of December, 1889, to the premises in dispute and farther alleges the entry of the townsite, defendant's occupancy at that time, the maintenance of valuable improvements upon the land; plaintiff's fraudulent application to the trustee for deed and the deeding by the trustee as alleged in the first cause of action of all of Lot 3 in Block 3 to the plaintiff; that this deed included a portion of the land occupied and owned by the defendant; that on January 3, 1898, defendant applied to the trustee for the premises owned by him in said blocks; that said application was faulty and defective in the manner above [353]

described because of the defect in defendant's deed; that defendant caused said parcel of land to be surveyed and said application amended in December, 1898, but that prior to the filing of said amended application, the trustee had already executed a deed to Lot 3, Block 3, to the plaintiff herein and the trustee ruled that he had parted with all title to Lot 3 and had no farther jurisdiction in the matter, but a deed not having been executed for Lot 2 a hearing was ordered to determine plaintiff's and defendant's rights therein; that upon such hearing the trustee determined that the defendant was entitled to a deed to all of the premises occupied by him in said lot; that in describing said premises in his decision, the trustee, through inadvertence and mistake, omitted a strip of ground off the north side of the land deeded to defendant a foot and 6 inches wide, which at the time of the entry of the townsite and ever since has been covered in its entirety by a resident block of the defendant. That at the time of the decision both plaintiff and defendant and the trustee believed the description covered and included all of the premises in Lot 2 covered by the house of the defendant.

Defendant further alleges that as concerning the first cause of action that all that portion of Lot 3 Block 3 occupied by him was deeded to the plaintiff by the trustee without notice to the defendant or knowledge by him until long after the deed had been issued. Defendant prays that plaintiff be decreed a trustee, holding title to said premises in trust for the defendant and be ordered and decreed to convey the

same by proper instrument to the [354] defendant; that the deed issued by the trustee to the defendant be reformed and that the defendant be decreed the sole owner in fee of the land involved and for general equitable relief.

Plaintiff demurs to the sufficiency of the pleas of the statutes of limitation to the causes of action and also denies the same. Plaintiff admits that he applied to the trustee at the times mentioned in the cross-complaint and received deeds to the lands described but denies the other allegations connected therewith. He denies fraud and the errors and mistakes alleged in the cross-complaint of the trustee and surveyor; alleges that the decisions of the trustee have never been reversed, annulled or modified. Plaintiff admits a mistake in the description in *Rxhibit* "A" attached to defendant's cross-complaint if the exhibit is a correct copy of the instrument.

Upon the trial a large amount of evidence was introduced including the record in the contest before the trustee over Lot 2 in Block 3, the findings of the trustee and the Commissioner and secretary upon appeal from the trustee's decision.

The evidence shows that the town of Juneau was settled and lots and blocks surveyed, allotted and occupied by the settlers in 1880; the lots in Block 1 as originally located were 50 feet wide by 200 feet long; that prior to the entry of the townsite by the trustee Block 1 had been divided into four blocks leaving the lots 50 feet by 100 feet; that the lots in Block 1 and 3 fronted on the north side of Front Street, Front

Street coinciding with the beach or water front of Gastineaux Channel; that original Block 1 was a long block and that for purposes of convenience prior to the entry of the townsite Seward Street was put through the middle of [355] Block 1 from Front Street; that Seward Street was 34 feet wide, whereas the lots in the block were 50 feet wide. This, it is claimed, left a fraction of a lot in Block 3 but the lots were as it appears rearranged full 50 foot lots being recognized at each end of Block 3, the defendant and his predecessors in interest giving and receiving deed to land described as that "certain piece or parcel of land situated, lying and being between Lots 2 and 3 in Block 3, as per Hanus plat." This it would appear was an effort to fix this fraction which had become afloat.

The official survey of the townsite was approved by the United States Marshal, ex-officio Surveyor General, on the 21st day of October, 1892, and the entry of the townsite made on the 13th of October, 1893. By this official survey there was no parcel or fraction of land left between Lots 2 and 3.

A great part of the evidence introduced concerning early occupancy and possession of the premises involved is contradictory and unsatisfactory, but this much is clear:

Regarding the land described in the third cause of action in the complaint, as this cause of action was dismissed on plaintiff's own motion upon the first trial, I hold that that matter is now closed, and there will be no further judgment concerning it.

It would appear that no reasoning or authority

other than that contained in the former decision of this case by the Court of Appeals, 167 Fed. 473 and *Miller vs. Margrie* by the same court, 149 Fed., 694, is necessary on the question of any fraud, accident or mistake in the issuance of the patents to plaintiff; It was held in those cases that persons claiming the right to obtain legal title to lots in the town of Juneau are required to make application therefor to the townsite trustee * * * that no allegations of fact showing how or the means whereby the plaintiffs were prevented from [356] having knowledge of the hearing before the townsite trustee and there litigating the right of possession in lots sued for were made, nor was it shown that such want of knowledge or want of opportunity to be heard before said townsite trustee was induced or caused by the defendant.

The Court held that it was incumbent on the plaintiffs to allege facts showing that without negligence on their part they were prevented from appearing before the trustee." In this case there has not been sufficient or any evidence on the part of the defendant to bring him within the foregoing requirements.

But to reason further:

As to the parcel of land described in the first cause of action in the Southeast corner of Lot 1 Block 3, I do not find any evidence of fraud on the part of the plaintiff let alone that clear, unequivocal and convincing evidence of fraud which is required to set aside or vary solemn instruments, as the patents issued to the plaintiffs in this case.

Maxwell Land Grant Case, 121 U. S. 325.

U. S. vs. American Bell Telephone Co., 167 U. S.

In fact the pleading of the defendant excusing himself for not knowing where the corner of this lot was until long after the erection of his building would itself tend to preclude any imputation of fraud on the plaintiff's part in claiming the entire lot.

The regulations of the Department of the Interior June 12, 1903, regarding the townsite in Alaska provide that the trustee "will observe and follow as strictly as the platting of the townsite will permit the rights of all parties to the property claimed by them as shown by the records of the Clerk of the District Court of Alaska." [357]

It is the policy of this law and its administration to award the entire lot to the occupant and bring the possession and interest of the occupants of the townsite into something like order and not leave their holdings interlocked and dovetailed.

Carter vs. Ruddy, 166 U. S. 493.

The system of surveys and disposal of all Government lands, agricultural, timber, mineral and townsite, contemplates the disposition of the same in rectangular parcels or at least with straight parallel side and end lines as more orderly, less wasteful and most beneficial to all concerned. For this reason, if not otherwise, the trustee should have the authority to straighten a ragged, irregular boundary between occupants, even if in so doing such straightened boundary necessarily excluded portions of an occupant's improvements of small value.

It appears by the evidence that at the time the defendant erected the two-story frame building upon his land, which is proven to have cost upwards of

\$4,000.00 that the foundation was laid to include this corner of land and the matter was called to the attention of the agents of the owner and the question then considered of notifying the defendant and preventing his building the same so far to the westward as to include this ground, but no such steps were taken and plaintiff's predecessor in interest permitted the building to be completed without so doing. Under these circumstances it appears inequitable to award this ground to the plaintiff and allow him to chop a hole in the side of a valuable building and very materially damage and disfigure it. In fact it would not appear to be any abuse of discretion to ignore the encroachment upon this small fraction of ground under the *maxim de minimis non curat lex*. [358]

The order of the Court will be that the plaintiff will be enjoined from entering into the possession of this ground or recovering the same from the defendant, but will be allowed sixty days within which to institute a suit for the recovery of its value and damages, if any, to the remainder of the tract which issue may be framed in this suit and jurisdiction retained for that purpose or an independent suit as plaintiff shall upon consideration deem advisable, such injunction to remain in effect until sixty days after execution upon any money judgment obtained in such suit shall be returned unsatisfied, and until the further order of this Court.

Regarding the land in controversy in Lot 3 Block 3 involved in the second cause of action as set forth in the complaint and also in the cross-complaint, I am of the opinion that plaintiff should recover possession as prayed.

The defendant in his original answer stated that the trustee gave notice pursuant to the regulations of the Secretary of the Interior that he would on the 15th day of November, 1897, set apart lots and parcels of land in said townsite to the occupants. It also was so stipulated upon the trial. On December 3d, 1897, the plaintiff filed his application with the trustee for the lands embraced in Lots 2 and 3 of Block 3.

On January 3d, 1898, the defendant filed his application for deed, defective as above set out, in that it described the land claimed by him as lying between Lots 2 and 3 in Block 3 instead of describing it according to the official plat.

The plaintiff did not receive the patent to Lot 3 until July 20, 1898. It is therefore concluded that as long as defendant's deed and the record thereof did not disclose any occupancy or interest of his in Lot 3 that in so far as the Government in regulating the disposal of its lands is [359] concerned the notice which it is admitted the trustee gave is sufficient.

Miller vs. Margrie, *supra*.

Valentine vs. McGrath, *supra*.

I further conclude that inasmuch as it is shown that the defendant filed his application for the lands claimed by him as described in the only deed he had, long prior to the patenting of any land to plaintiff, that he had notice that the trustee was disposing of the lots and that he cannot therefore complain for want of notice. That if there was a mistake made by the trustee, he was misled thereto by the representations of the defendant himself and that he cannot

now complain on account thereof; it was a blunder on defendant's part and in no sense a mutual mistake of his and the plaintiff.

Vol. 20, 2nd Ed., Am. & Eng. Ency.

Law, page 816 b b, and citations.

That portion of Lot 3 which the defendant claims to own and occupy juts into the west side of Lot 3 in such an irregular manner as to destroy its uniform outline and to a great extent the usefulness of the remainder and I am of the opinion that the injury to the remainder of the property would be greater than the benefit to the defendant and that the trustee was authorized under the cases above cited and the regulations above quoted in awarding all of Lot 3 to the plaintiff, had all the facts been before the trustee.

Further, it is alleged by the defendant in his original answer that the trustee did "actually hear and determine on said false and fraudulent statements the said questions of said occupancy and ownership of said lots and acting under the belief that said statements were true, executed to the plaintiff a trustee's deed" conveying to plaintiff Lot 3 in Block 3. [360]

It was further proven and conceded that if the trustee made any mistake it was one of fact regarding the occupants and rights of occupancy of Lot 3 and not one of law under conceded facts. This being true, the decision of the trustee is conclusive in the absence of fraud which as shown has not been proven.

New Dunderberg Mining Co. vs. Old et al., 79 Fed. 598.

King vs. McAndrews, 111 Fed. 860.

The cases called to my attention by counsel for the defendant are cases, not where the trustee mistak-

only decided concerning occupancy but where under the facts he made a mistake in the law.

Regarding the disputed area in Lot 2 of Block 3 the decision will be the same for the reasons which have already been given, and the additional reason that the defendant again himself misled the trustee regarding the extent of his occupancy by his amended application for location.

There was no evidence to show the Court upon the trial that this was in any wise a mutual mistake of plaintiff and defendant, although so plead. It is likewise apparent that to so hold would not be inequitable as it is shown that the defendant's original holding was only 100 feet deep from Front Street and that he has encroached to the rear until it has become 120 feet deep and now seeks to extend that.

Although the defendant by his cross-complaint has sought to invoke the equitable powers of the Court and ask equity, he has at no time tendered or offered to pay the plaintiff any part of the \$48.00 assessed by the trustee against each of lots 1 and 3 in Block 3 for the administration of the trust and paid by the plaintiff. [361]

Regarding the defense of the ten year statute of limitations I am of the opinion that the defendant cannot invoke this statute in this case. This is a strictly legal defense and to allow the defendant the benefit thereof would be to allow him to collaterally attack the trustee's finding of plaintiff's occupancy at the time of the execution of the patents.

The town of Juneau was settled and these lands first occupied about 1880.

The official survey for entry of townsite was made in 1892.

The entry of townsite was made in October, 1893.

The plaintiff and defendant were then occupants of these adjoining lands.

Patent was made to trustee in 1897.

The plaintiff applied to trustee for disputed lands 1897.

The defendant applied to trustee for his lands in January, 1898.

Patents were issued by trustee to plaintiff in July, 1898.

This suit was begun in April, 1907.

The ten year and seven year statutes of limitations relied upon by the defendant are as follows:

“Sec. 4. WITHIN TEN YEARS. The periods prescribed in section three of this act for the commencement of actions shall be as follows:

“Within ten years actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within ten years before the commencement of the action; Provided, in all cases where a cause of action has already accrued, and the period prescribed in this section within which an action may be brought has expired or will expire within one year from the approval of this act, an action may be brought on such cause of action within one year from the date of the approval of the act.”

“Sec. 1042. TITLE BY ADVERSE POSSESSION. The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto except as against the United States.” [362]

It is the contention of defendant's counsel that the statute of limitations commenced to run against the plaintiff the moment his right of action accrued, that in Alaska the right of action accrued the moment ouster took place, although the record title was still in the Government. To this point the following cases are cited:

Wilson vs. Fine, 38 Fed. 789.

Mickey vs. Stratton, 5 Sawyer, 475.

Campbell vs. Silver Bow Basin M. Co., 49 Fed. 47.

Miller vs. Blackett, 47 Fed. 547.

Davis vs. Dennis, 85 Pac. 1079.

Copper River Lumber Co. vs. Humphrey, 2
Alaska, 39.

None of these cases involved the question of the statute of limitations. They simply held that one in the peaceable and quiet possession of real property can eject and recover the same from a mere trespasser or intruder.

To this point plaintiff's counsel further relies upon:

Missouri Valley Land Co. vs. Wiese, 208 U. S.
234.

Iowa R. R. Land Co. vs. Blumer, 206 U. S. 482.

Eastern Oregon Land Co. vs. Brosnan, 173 Fed.
67.

Boe vs. Arnold, 102 Pac. 290.

But all of these latter cases were cases where it was held that the possession of land although in admitted subordination to the United States from which the person in possession is seeking to obtain title may nevertheless be adverse to everyone else and when continued for the statutory period may be set up in bar to an action by one claiming under a prior grant. In all of these cases there had been a prior grant *in praesenti* by which the adverse party had been seized of title and right of possession. The plaintiff in this case was not seized of title under any grant from the Government until the issuance of his patent. [363]

To start the statute of limitations running against the plaintiff he must have been disseized and in order to be disseized he must at some time have been seized of title, either of fee or freehold and this he was not until the issuance to him of patent.

Tyee Con. Mining Co. vs. Langstedt, 136 Fed. 124, and cases cited, page 126.

It has been argued by counsel that this case is overruled by the Eastern Oregon Land Co. vs. Brosnan, *supra*, but I conclude as above pointed out that the latter decision is not sufficiently far reaching to have the effect contended for.

Counsel for defendant further contends that even if the statute did not commence to run until the Government had parted with title, this took place at the time entry was made by the townsite trustee October 13, 1893, 14 years before the commencement of this action and counsel relies upon the authority of *Ashby vs. Hall*, 119 U. S. 526. That decision was

to the effect that the trustee could not dispose of an alley in the City of Helena, Montana, of which an occupant of a lot in that city had the use and benefit at the time of the entry of the townsite in such manner as to deprive him of that right. The rights and interest of such occupant in the highways of the City of Helena might be a vested right before the bounds and extent of his interest in lots had been determined and title by patent thereto vested in him. The scope of that decision is shown by the following therefrom—"These regulations (referring to the statutes of the territory) might extend to provision for the ascertainment of the nature and extent of the occupancy of different claimants of lots and the execution and delivery to those found to be occupants in good faith of some official recognition [364] of title in the nature of a conveyance, but they could not authorize any diminution of the rights of the occupants *when the extent of their occupancy was established*. It is the delay, the duration of time after title seized, that raises the bar of the statute; this may not be by relation, else one ought be barred before time seized.

Such occupants would not be seized of title to any particular tract of land until the extent of their occupancy was determined and established by the trustee which and the date thereof is alone evidenced by the patent. The trustee is not a naked trustee for the purpose of holding title but he is charged with the duty of officially determining questions of fact, if not of law, concerning the rights of parties in the townsite, their occupancy and the extent

thereof and to require the payment of assessments in the nature of purchase money by the occupants prior to the issuance of patent.

It is therefore clear that any decisions upholding the right of action on an equitable title *when nothing more remains to be done by the claimant are not applicable.*

The lands contended for in Lot 2 Block 3 would not be affected under this contention because of the amended application of the defendant falling short of his now claimed occupancy on the northwestern line of his holdings in that lot. The application in this shape would itself be sufficient to warrant the conclusion that his occupancy if any beyond that line was not adverse. Patents were not issued to the parties in this lot until after the contest of 1901.

Defendant showed no color of title to render applicable the seven year statute of limitation. The plaintiff himself testified and attempted to qualify as an expert [365] on the rental value of his property which the defendant had been withholding from him. This was merely opinion upon his part and the Court is not inclined to be bound by his opinion nor follow the rule by which he arrived at the rental value, as there was no other evidence on this question; he will be allowed the nominal amount of \$10.00 for the detention of all parcels of property hereby awarded him during the time herein involved.

Plaintiff by his complaint sought to recover all of Lot 2, Block 3, the greater part of which was held by defendant under trustee's deed and covered with valuable improvements of the defendant, and as the

defendant by his cross-complaint seeks to recover other lands herein awarded to plaintiff, neither party will recover costs. The decree will confirm in all things the deeds of the trustee.

Done in open court this 16th day of May, 1910.

EDWARD E. CUSHMAN,

District Judge.

[Endorsed]: Original No. 613-A. In the District Court of the United States for the Div. One of Alaska. Emery Valentine vs. J. J. McGrath and S. Hirsch. Decision of Court. Filed May 16, 1910. H. Shattuck, Clerk. By M. H. McLellan, Assistant.
[366]

[Title of Court and Cause.]

Writ of Error.

UNITED STATES OF AMERICA.—ss.

The President of the United States of America to the Judges of the District Court for Alaska, Division No. 1, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between Emery Valentine, Plaintiff, and J. J. McGrath, and S. Hirsch, defendants, a manifest error hath happened, to the great prejudice and damage of the said plaintiff, Emery Valentine, as is said and appears in the petition herein;

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, together with this writ, so as to have the same at said place in said Circuit, on or before thirty days after the date hereof, so that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and justice and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this the 3d of June, 1911.

Attest my hand and the seal of the District Court for [367] Alaska, Division No., on the day and year last above written.

E. W. PETTIT,
Clerk.

By J. J. Clarke,
Deputy Clerk. [368]

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath, S. Hirsch, Defendant. Writ of Error. Filed and Served by Deposit of a Copy. June 3, 1911 E. W. Pettit, Clerk. By J. J. Clark, Deputy. [369]

[Title of Court and Cause.]

Citation in Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to
J. J. McGrath, and S. Hirsch, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error, filed in the clerk's office of the District Court for Alaska, Division No. One, wherein Emery Valentine is plaintiff, and you are defendants in error, to show cause, if any there be why the judgment mentioned in said writ of error should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 3d day of June, 1911, and of the Independence of the United States the one hundred and thirty-fifth.

EDWARD E. CUSHMAN,

Judge.

Service of the above and foregoing citation in error is admitted to have been duly made, this 3d day of June, 1911.

LEWIS P. SHACKLEFORD,

Attorney for J. J. McGrath and Defendants in
Error.

S. HIRSCH,
For Himself. [370]

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau Emery Valentine, Plaintiff, vs. J. J. McGrath, S. Hirsch, Defendants. Citation in Error. Filed June 3, 1911. E. W. Pettit, Clerk. By _____, Deputy.

[Title of Court and Cause.]

Praeipice for Transcript.

To the Clerk of the District Court for Alaska, Division No. 1:

You will please make up a transcript of the record upon the writ of error in the above-entitled cause and include therein the following pleadings and papers, to wit:

- (1) Complaint.
- (2) Answer of S. Hirsch.
- (3) Second amended answer of J. J. McGrath, filed January 5, 1910.
- (4) Reply to answer of J. J. McGrath, filed January 29, 1910.
- (5) Findings of fact and conclusions of law, filed June 16, 1910.
- (6) Judgment, June 21, 1910.
- (7) Bill of Exceptions, filed June 3, 1911.
- (8) Petition for writ of error.
- (9) Assignment of error.
- (10) Bond.
- (11) Order extending time to file transcript.
- (12) Order to attach affidavits, etc. to bill of exceptions.

- (13) Opinion of Court, filed May 16, 1910.
- (14) Original writ of error.
- (15) Original citation.
- (16) This praecipe.
- (17) Certificate.

Said transcript to be made in accordance with rules of practice of the U. S. Circuit Court of Appeals for the Ninth Circuit and the rules of this Court.

J. H. COBB,
Attorney for Emery Valentine.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath, Defendant. Praecipe for Transcript. Filed Jul. 13, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. Malony and Cobb, Attorneys for ————. Office: Juneau, Alaska.

[Endorsed]: Copy. No. 613-A. In the District Court *fo* the District of Alaska, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath et al., Defendants. Praecipe for Transcript. [372]

[Clerk's Certificate to Transcript.]

[Title of Court and Cause.]

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that the foregoing and hereto attached three hundred, seventy-two pages of typewritten and written matter, numbered from one to three hundred and seventy-two, both inclusive, constitute a full, true and correct copy of the record, and the whole thereof prepared in accordance with the Praecipe of the

plaintiff and plaintiff in error on file in my office and made a part hereof, in Cause No. 613-A of the above-entitled Court, wherein Emery Valentine is plaintiff and plaintiff in error, and J. J. McGrath and S. Hirsch are defendants and defendants in error.

I do further certify that the said record is by virtue of Writ of Error and Citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the costs of preparation, examination and certificate, amounting to One Hundred Sixteen and 80/100 Dollars (\$116.80) have been paid to me by Malony and Cobb, attorneys for plaintiff and plaintiff in error.

[Written on side:] By J. J. C. E. W. P.

In witness whereof I have hereunto set my hand and affixed the seal of the above-entitled court this 8th day of August, 1911

[Seal]

E. W. PETTIT.

Clerk of District Court, Dist. of Alaska, Division
No. 1.

[Endorsed]: No. 2016. United States Circuit Court of Appeals for the Ninth Circuit. Emery Valentine, Plaintiff in Error, vs. J. J. McGrath and S. Hirsch, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed August 15, 1911.

F. D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

NO. 2016

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMERY VALENTINE,
Plaintiff in Error.

vs.

J. J. McGRATH and S. HIRSCH,
Defendants in Error

Upon Writ of Error to the United States District
Court for the District of Alaska, Division No. 1.

BRIEF OF PLAINTIFF IN ERROR

J. H. COBB,
Attorney for Plaintiff in Error.

NO. 2016

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMERY VALENTINE,
Plaintiff in Error.
vs.
J. J. McGRATH and S. HIRSCH,
Defendants in Error

Upon Writ of Error to the United States District
Court for the District of Alaska, Division No. 1.

BRIEF OF PLAINTIFF IN ERROR

J. H. COBB,
Attorney for Plaintiff in Error.

NO. 2016

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMERY VALENTINE,

Plaintiff in Error.

vs.

J. J. McGRATH and S. HIRSCH,

Defendants in Error

Upon Writ of Error to the United States District
Court for the District of Alaska, Division No. 1.

BRIEF OF PLAINTIFF IN ERROR

J. H. COBB,

Attorney for Plaintiff in Error.

STATEMENT OF THE CASE

This was an action in ejectment, brought by the plaintiff in Error to recover three separate portions of land in the Town of Juneau, Alaska.

The Court will obtain a clearer idea of the property in controversy by a glance at the plat on page 73 of the record, than by a description. The parcels sued for are colored in red on the said plat.

Plaintiff alleged ownership in fee simple, and prayed for restitution, and rental value as damages. (Rec. 3-7.)

Defendant Hirsch answered denying the allegations of the complaint for want of knowledge, and affirmatively plead a lease from his co-defendant. (Rec. 8-10.)

Defendant McGrath answered, denying the allegations of the complaint, a plea of the statute of limitation of seven and ten years, and filed a cross complaint alleging in substance that plaintiff had obtained the title to the ground in controversy from the Townsite Trustee fraudulently and prayed that he be charged as trustee for the defendant. The deeds from the Townsite Trustee to plaintiff were attached to the cross-complaint as exhibits. (Rec. 11-56). This answer and cross-complaint were filed January 5th, 1910.

Plaintiff replied denying the affirmative answer, and the allegations of fraud in the cross-complaint.

In as much as the findings and decree of the Court were adverse to the defendant in his affirmative defenses and cross-complaint and defendant has acquiesced therein a fuller statement thereof is deemed unnecessary.

The case was by stipulation tried to the Court. (Rec. 64.)

At the hearing all errors in description in the pleadings were waived and considered as amended to conform to the proofs. (2 finding Page 65.)

The Court made the following findings of fact and conclusions of law:

“This cause came on regularly for trial, and thereupon came the plaintiff by his attorney, J. H. Cobb, and the defendants by their attorney, John Rustgard, and all parties announced ready for trial; and all parties in open court waived a jury and agreed to submit all issues of fact as well as of law to the Court. And the Court, having heard the evidence and argument of counsel thereon, makes the following Findings of Fact:

1. The ground in controversy in this action is a part of the Town of Juneau, Alaska, which was entered for patent under the townsite laws upon October 13, 1893; the ground in controversy being portions of Lots 1, 2, and 3 in Block 3, and a portion of Lot 1 of Block G, in said town.

2. On the hearing it was expressly stipulated in open Court by counsel for both sides that any errors

in description in the pleadings should be considered as amended to conform to the proof, and the case was heard and tried fully upon the merits.

3. Plaintiff in 1897, shortly after the issuance of patent and after the proper posting and publication of notice by the townsite trustee that his office was ready to proceed to the issuance of deeds under the townsite laws, made his [56] application for deeds to all of Lots 1, 2 and 3 in Block 3, according to the official survey of said town, and to the following described portion of Lot 1, in Block G, to wit: "Beginning at a point on the common boundary line between Lot No. 1 in Block No. 3, and Block G, about 2 feet distant Westerly from the southeast corner of said Lot No. 1; thence southerly 33.7 feet to a point on the south boundary line of said Block G 51.8 feet easterly from the west corner of said Block G; thence westerly along the south boundary line of said Block; thence along the common boundary line Lot No. 1, in Block No. 3, and Block G, to the point of beginning.

4. On the 3rd day of January, 1898, and before the issuance of any deed to the plaintiff, the defendant J. J. McGrath, made his application before the townsite trustee for a deed to a piece of ground described as follows, to wit: "That certain piece or parcel of land situate, lying and being between Lots 2 and 3, in Block 3, as per Hannan's plot, said piece or parcel of land fronting on the waterfront of said Town of Juneau and being 60 feet in width on said water-

front street and extending back a distance of 100 feet and being 24 feet in width on or at the rear end or line of said described piece or parcel of land.”

5. The above and foregoing description in an imperfect description and is incapable of identification on the ground, and the townsite trustee, proceeding regularly upon the application of the plaintiff, thereafter on or about the 14th day of July, 1898, issued a deed to plaintiff, conveying to him all of Lot 1, in Block 3, and all of Lot 3, in Block 3, and the defendant never filed any contest against the application of the plaintiff for said Lots 1 and 3, in Block 3. [57]

6. The defendant, McGrath's application, as above made, was contested by the plaintiff, Valentine,, before the townsite trustee and the contest was heard upon the plaintiff's application for the premises in Block G, described above, and his application for Lot 2, in Block 3, and the defendant, McGrath's application for the premises attempted to be described in his application and on December 9, 1898, the defendant was required by the trustee to file, and did file, and amended application, which is set out in the defendant, McGrath's, cross-complaint. Said contest was regularly heard and voluminous evidence introduced and, after a full hearing, the plaintiff, Valentine, was awarded the following described portion of Lot 2, in Block 3, to wit: “Commencing at a point at a point on the dividing line between Lots One (1) and Two (2), in Block

Three (3) 3.6 feet measured on said line from Block G; thence running in a northwesterly direction on said line a distance of 96.6 feet to the dividing line between Lots One (1) and Two (2) and Seven (7) and Eight (8), in said Block Three (3); thence in an easterly direction on said dividing line a distance of 50 feet to the east corner of said Lot Two (2), in Block Three (3); thence in a westerly direction on the dividing line between Lots Two (2) and Three (3), a distance of 12.6 feet; thence south 60 degrees 52 minutes 18.1 feet, thence south 29 degrees 8 minutes east 30.3 feet; thence south 17 degrees 55 minutes west to place of beginning, according to the official survey and plat of said Juneau, Alaska, as executed by G. W. Garside and approved by the trustee of the townsite of Juneau." Said trustee made his deed to Valentine for said premises on the 18th day of July, 1901, and on the 18th day of July, 1901, he executed to Emery Valentine his [58] deed for the following described portion of Lot 1, in Block G, to wit:

Beginning at the southwest corner of Lot One (1) in Block Three (3); thence in a southeasterly direction on the Northerly line of Front Street a distance of 51.8 feet; thence north 17 degrees 55 minutes west to the dividing line between said Block Three (3) and Block G. Thence in a southwesterly direction on the dividing line between said Block Three (3) and Block G to the place of beginning. The defend-

ant, McGrath, was awarded all the remaining portion of Lot No. 2, in Block 3, and a portion of Lot 1, in Block G, not in controversy in this suit. The plaintiff, Valentine, appealed from said decision of the townsite trustee, but the decision of the trustee was affirmed on appeal by the Secretary of the Interior.

7. The property in controversy in this suit is more particularly shown upon the plat hereto attached and made a part hereof, and being the portions colored in red on said plat except that portion so colored in Block "G"; and said premises are described by field-notes as follows:

First: A portion of Lot One (1) in Block No. Three (3).

Beginning at the Southeasterly corner of said Lot No. One (1) at the Southwesterly corner of Lot No. Two (2) in Block No. Three (3); Thence N. 44 degrees W. on the dividing line between said Lots One and Two in Block Three a distance of 3.3 feet; thence Southerly 3.3 feet to a point on the south boundary line of said Lot One in Block Three, 1.5 distant from the Southeast corner of same, identical point of beginning; thence along the southerly boundary line of said Lot One in Block Three to the place of beginning.

Second: A portion of Lot N. Two (2) in Block No. Three (3), and a portion of Lot No. Three (3) in Block No. Three (3).

Beginning at a point on the common boundary line between said Lots Nos. 2 and 3 Block 3, 11.1 distant from the NE. corner of Lot 2, and the NW. corner of Lot 3; Thence N. 59 degrees 9 minutes E. 10 feet more or less to the corner of the building occupied by the defendants; thence S. 30 degrees 31 minutes E. 24.2 feet to the SE. corner of said building; thence S. 59 degrees 9 minutes W. 2.4 feet more or less to the intersection of the common boundary line between said Lots 2 and 3 in Block 3; [59]

Thence N. 44 degrees W. along said line 23.3 feet to a point on said line 12.6 feet distant from the NE. corner said Lot 3 in Block 3;

Thence S. 60 degrees 52 minutes W. 18.1 feet; thence S. 29 degrees 8 minutes E. 30.3 feet;

Thence No. 30 degrees 51 minutes W. 24.2 feet to the corner of the building occupied by the defendants; thence N. 59 degrees 9 minutes E. along the north line of said building to the place of Beginning.

Third: A portion of Lot No. Three (3) in Block No. Three (3).

Beginning at a point on the common boundary line between Lots 2 and 3 in Block No. 3 29.6 feet distant from the SW. corner of said Lot 3, and the SE. corner of said Lot 2; thence N. 70 degrees 6 minutes E. 3.8 feet; thence N. 16 degrees 54 minutes W. 3.3 feet; thence S. 70 degrees 6 minutes E. 3.8 feet; thence N. 19 degrees 54 minutes W. 3.3 feet; thence S. 70 degrees 6 minutes W. 5.2 feet to the in-

tersection of said line between said Lots 2 and 3; thence S. 44 degrees E. along said line to the place of Beginning.

8. The failure of the defendant, McGrath, to file a contest over the application of the plaintiff for deeds to Lots 1 and 3, In Block 3, was due to no act or omission on the part of the plaintiff but appears to have been due solely to the negligence of the defendant, McGrath.

9. The contest between McGrath and the plaintiff, Valentine, over Lot 2, in Block 3, was fairly and fully heard, and there is no evidence of a mistake on part of the trustee in the conclusions arrived at.

10. The Court further finds that there is a two-story building costing about Four Thousand Dollars (\$4,000.00) standing upon the defendant's ground, and which encroaches upon and covers that portion of Lot 1, in Block One (1) in controversy herein; that at the time of the erection of the building no notice was given by the owner of this small encrachment but the building was permitted to be completed without objection. Under these circumstances the Court finds it inequitable to award this ground to the plaintiff and allow him to chop a hole in the side of a valuable building, and materially damage and disfigure it, but plaintiff is entitled to recover the value of this piece of ground, and upon the payment of such value by the defendant he is entitled to an injunction against plaintiff, or [60] a conveyance.

11. The rental value of that portion of the ground awarded plaintiff is Ten Dollar (\$10.) for the entire time it has been withheld by the defendant.

12. The defendant, S. Hirsch, is a tenant of McGrath and holding under him, and has no other interest in the premises.

From the above and foregoing facts, I conclude as matter of law—

1. That plaintiff is the legal and equitable owner of the premises in controversy, holding the same under patent from the United States to the townsite trustee and deeds from the townsite trustee to himself, and is entitled to recover the same with nominal rental thereof, to wit \$10.00.

2. The defendant, McGrath, is concluded by the award of the townsite trustee from any claim in the premises in controversy.

3. The plaintiff is holding from and under the United States and the seven years statute of limitations plead by the defendant is not applicable, since it would in effect be to plead the same against the United States. I further conclude that the defendant, McGrath, is not holding the premises in controversy under any color of title.

4. The ten years statute of limitations plead by the defendant, McGrath, did not run at the time of the beginning of this action since the statute did not begin to run against the plaintiff until he received his deeds. The plaintiff is entitled to judgment

against both defendants for restitution of the premises in controversy, excepting that portion of Lot One (1) in Block One (1), and against McGrath for the rental value thereof, amounting now [61] to the sum of Ten Dollars (\$10.00); and a judgment that the defendant ,McGrath, take nothing by his cross-complaints.

5. It is further ordered that the plaintiff be and he is hereby enjoined from entering upon that portion of Lot One (1) in Block One (1) described in the first cause of action and in these findings, but will be allowed sixty (60) days within which to institute a suit for its value and damages, if any, to the remainder of the tract, which issue may be proved in this suit, and jurisdiction retained for that purpose, or an independent suit instituted by plff.' as plaintiff may elect, and the injunction to remain in effect until sixty (6) days after the return unsatisfied of an execution upon any money judgment that may be recovered and the further order of the Court.

6. Each party will pay their own costs herein.

Let a judgment enter accordingly.

Dated, June 16th, 1910.

EDWARD E. CUSHMAN,

Judge.

(The plat referrel to is found on page 73 of the record.)

A judgment following these findings and conclusions was entered. (Rec. 75-77.)

From this judgment the plaintiff sued out a writ of error to this Court, assigned errors and now presents the case here for correction and review.

FIRST ASSIGNMENT OF ERROR

“The Court erred in not awarding to the plaintiff Emery Valentine, that portion of Lot No. 1, in Block G, of the town of Juneau, described in the third cause of action in the complaint, and in the second amended answer of the defendant McGrath,” (Rec. 90.)

The Court found that this property was in controversy. (1st finding, record page 64). This finding was modified by excepting that portion of the property, in the 7th finding. (Rec. 68.)

The Court gave the following reason for this action:

“Upon the motion of the plaintiff for judgment on the pleadings judgment was entered in this Court in 1908 decreeing that plaintiff recover from the defendant possession of the southeast corner of Lot 1, Block 3, being a triangular piece of ground 3 1-3 feet by 3 1-3 feet by 11½ feet, and two parcels of ground in Lot 3, Block 3, awarding the plaintiff damages for the detention of said property in the sum of One Thousand One Hundred and Twenty-Eight Dollars (\$1128), said judgment upon motion of plaintiff to dismiss the third cause of action as affecting the land in Lot 1 in Block G it was so ~~adjusted~~ *dictated*. Upon writ of error to the Court of Appeals sued out

by the defendant said cause was reversed and remanded on account of the judgment being given for the amount of damages prayed in the complaint over the general denial in the defendant's answer. (167 Federal 473.)

"Upon the coming down of the mandate to this Court the defendant McGrath interposed a farther amended answer, which in addition to general denials of the allegations of the plaintiff's complaint pleads to each of said causes of action the defense of seven years actual, uninterrupted, exclusive, adverse, open, notorious, continual and hostile possession and occupancy of the premises in controversy immediately prior to the commencement of the action, under color and claim of title." (Rec. 95-96.)

And further along the Court held:

"Regarding the land described in the third cause of action in the complaint, as this cause of action was dismissed on plaintiff's own motion upon the first trial, I hold that the matter is now closed, and there will be no further judgment concerning it." (Rec. 95-96.)

And the Court refused to give plaintiff a judgment on the 3rd cause of action. This we think manifest error.

When the former judgment rendered in 1908 was set aside the judgment of non-suit was likewise set aside, as it formed a part of it.

Not only so, but plaintiff and defendants so regarded it. The plaintiff McGrath amended his answer and not only joined issue as to the third cause of action (Rec. 13-14) but filed a cross-complaint to it asking that the plaintiff be charged as his trustee (See 4th paragraph to answer and cross-complaint, Rec. 42-43.)

Both parties proceeded upon the theory that the premises in question were still in controversy and both sides presented evidence in full upon their respective titles. The Court heard the controversy without objection and actually determined the invalidity of the defendant's claim. Not only so, but the Court further determined the validity of the plaintiff's title. Why then refuse plaintiff judgment? Simply because at one time there had been a non-suit taken as to this portion of the disputed premises, which non-suit this court set aside; and that setting aside was acquiesced in as final by the defendant, McGrath, and thereafter he plead to that cause of action, and sought affirmative relief as to the premises.

SECOND ASSIGNMENT OF ERROR

"The Court erred in not awarding to the plaintiff, Emery Valentine, that portion of Lot No. 1 in Block No. 3 of the town of Juneau, described in the 1st cause of action in the complaint; and further erred in awarding the same to the defendant, McGrath, conditioned upon his paying any judgment that

might be recovered against him for the value of said premises, together with damages for with-holding the same in any suit that said Emery Valentine might bring within sixty days against the said McGrath." (Rec. 90.)

A judgment must follow and be supported by the pleadings. A Court has no power to adjudicate matters outside the issues made by the pleadings.

Black on Judg. Vol. 1, Sec. 183.

Kelley vs. Burton, 199 Fed. 466.

J. P. Jorgenson Co. vs. Rapp, 157 Fed. 732.

Lesaius vs. Goodman 165 Fed. 889.

Wagner Nat. Bk. vs. Welch, 164 Fed. 813.

And the rule is the same in equity.

Stanwood vs. Des Moines Sav. Bk., 178, Fed. 670.

The reason for that part of the judgment herein complained of, is stated by the Court in its written opinion as follows:

"It appears by the evidence that the time the defendant erected the two-story frame building upon his land, which is proven to have cost upwards of \$4,000.00 that the foundation was laid to include this corner of land and the matter was called to the attention of the agents of the owner and the question then considered of notifying the defendant and preventing his building the same so far to the westward as to include this ground, but no such steps were taken, and the plaintiff's predecessor in interest permitted the building to be completed without so

doing. Under these circumstances it appears inequitable to award this ground to the plaintiff and allow him to chop a hole in the side of a valuable building and very materially damage and disfigure it. In fact it would not appear to be any abuse of discretion to ignore the encroachment upon this small fraction of ground under the maxim *de minimis non curat lex*." (Rec. 103-104.)

In other words the Court in effect found that plaintiff was estopped by the conduct of his predecessor in interest from claiming this particular ground. But no such issue was made by the pleadings. No where is it claimed that plaintiff or his predecessors in interest mislead the defendant by silence or otherwise as to the extent of their claim, so as to have induced the defendant to build his house on their ground. On the other hand the pleadings show that defendant was claiming said ground under deeds conflicting with the plaintiff's title; that this conflict was heard and settled adversely to the defendant by the townsite trustee; and the only relief sought was to charge the plaintiff as trustees for the defendant by overturning the decision of the trustee, to have the plaintiff make a conveyance, and to correct the trustee's deeds.

Besides this the Court does not find that the defendant McGrath was mislead by the failure to object on the part of the plaintiff's predecessor in interest, or relied thereon.

“Another essential element of estoppel by misrepresentation or concealment is that one party should have relied upon the conduct of the other and been induced by it to act or to refrain from acting so that he will be substantially injured if the other party should be allowed to repudiate his action. And this rule applies as well where the conduct of the party to be estopped consists of silence as where it consists of positive acts.”

11 Am. and Eng. Enc. Law 2nd Ed. 436.

This “essential element” is lacking in the findings as well as in the pleadings. The truth is McGrath was at all times aggressively claiming the property and litigating his supposed rights to it. Under such circumstances to have warned him would have been an idle act. Besides the time to have set it up was when the contest was had before the town site trustee.

The Court below, however, did not proceed to the logical end, by adjudging the defendant entitled to the ground on the principles of estoppel. Rather the defendant was allowed to exercise a sort of Eminent Domain by compelling in effect a conveyance from plaintiff, upon paying the adjudged value. But if the plaintiff is unable to collect the adjudged value on execution, he might take his land, having paid the costs and expenses of the proceeding as a penalty therefor. For this proceeding we look in vain for any warrant in the law.

THIRD ASSIGNMENT OF ERROR

“The Court erred in not awarding to the plaintiff, Emery Valentine, the sum of \$10.00 per month from May 1st, 1901, to the time of trial, as rentals on the property in controversy.”

The alleged rental value of the premises sued for aggregates \$17.00 per month.

Defendant Hirsch denies this generally for want of information.

Defendant McGrath denies it generally. Neither defendant alleges the rental value or that it had none.

The record contains all the evidence offered on the trial. All the evidence on this issue has been printed. (Rec. 79-86.)

This is the testimony of the plaintiff himself, which is in substance as follows:

Witness had resided in Juneau 23 years; had a great deal of experience in renting property and collecting rents, both for himself and as agent for others; had collected as much as \$1000 per month for his own rentals on different tracts; thought he knew the rental value of property in Juneau; knew the property in controversy; knew the rental value of property in that part of town having rented adjoining property; was worth 75 cents to a dollar per foot per month; the piece in Lot 1 Block G was too small to rent, but its occupancy deprived witness of the use of $1\frac{1}{2}$ feet extending the depth of the lot. It

was worth one dollar per month; the premises in the rear of the McGrath building occupied by defendants the collar shaped piece in Lots 2 and 3 Block 3 was worth \$7.50 per month; the piece in Lot 3 Block 3 was worth one dollar per month.

On cross-examination he testified as follows:

Q. You think it is worth about a dollar per month to McGrath to extend his corners that much on your ground? As shown on Defendant's Exhibit 1?

A. I don't understand.

Q. This projection shown on Defendant's Exhibit 1, marked "Cornice," that in fact represents the cornice of McGrath's building?

A. This part here of Lot 1?

Q. I refer to the cornice—What do you consider it worth to have the right or permission to extend that cornice over the property as it is shown?

A. It would be just the same as that if I could use that.

Q. Answer my question—What would you say was the rental value of that?

A. I don't know what the cornice is worth there. I never leased out ground for a cornice.

Q. What in your estimation is that worth?

A. I am not going to estimate because I never rented it out for that.

Q. Then you don't know the rental value of that?

A. I wouldn't put any rental value with the cornice hanging over there, no.

Q. Did you make a statement as to what the rental value was on that part of the southeast corner of Lot 1, Block 3 covered by the McGrath building?

A. Yes, what I had always got for that ground.

Q. How much?

A. About 75c per front foot.

Q. How much is that building there on your ground?

A. I am not a surveyor; you will have to ask the surveyor for that.

Q. What do you base your estimate on when you say it is worth 75c per month?

A. Because I said that was what I had always rented that ground for and that I had rented it at one time—the whole thing was rented out—

Q. For 75c per front foot?

A. Yes, sir.

Q. Have you ever rented anything by the square foot?

A. By the front foot, this and that (indicating).

Q. Do you charge up for the rental value of that corner as much as if the building extended over on your property clear through to the rear?

A. It deprives me of that much.

Q. That is the theory on which you base the estimate of the value?

A. Yes, sir.

Q. You have a stairway right there?

A. Yes, sir.

Q. Right along the wall of the McGrath building?

A. Yes, sir.

Q. And there is a distance of about three and one-half feet between the McGrath building and your building to the west of it?

A. Yes, sir.

Q. Approximately?

A. Yes, sir.

Q. (By the Court). I understand there is an open stairway runs up between the two buildings?

A. On account of his being over on my line my stairway is so very narrow that I can't even the up-stairs in the building.

Q. How wide is that stairway?

A. About 2 feet at the top.

Q. Your stairway is built up flush against the McGrath building?

A. Right up against the McGrath building, yes.

Q. How far to the front does your stairway extend along the McGrath building?

A. I don't know.

Q. Does it come out underneath this cornice?

A. I don't know; I never measured that part of it, I don't know how far near the front it extends.

Q. Did you testify that the space shown on Defendant's Exhibit 1 as being encroached upon by the McGrath house in the rear part was worth \$15 a month,—what did you say the rental value was of

the ground upon by McGrath's house, that is in the rear of the property?

A. You mean my ground?

Q. Yes, what you claim is yours?

A. \$7.50 per month for that; for my part.

Q. You have got a lot of vacant ground here on Lot 3?

A. Yes, sir.

Q. How much s that, \$7.50 per month?

A. Because I can't use it on account of that, I couldn't build the sidewalk through from this alley way back into the Central Hotel on account o fthat, I couldn't build anything because it cut me out.

Q. Do you rent any of this property back here (indicating).

A. Yes, sir.

Q. What do you rent.

A. I have a couple of cabins in there.

Q. What do you get for those cabins?

A. \$5.00 a month.

Q. Cabin an dall?

A. Yes.

Q. When you figure the rental value of this property do you figure on the renting of the house or is that only the ground rent?

A. I figure the ground rent as worth that much.

Q. The ground alone?

A. Yes, sir.

Q. How long have those buildings been there?

A. Which ones?

Q. The rear building, to begin with?

A. This residence of McGrath?

Q. Yes.

A. I don't know, it was there in 1886.

Q. How long has the front building been where it now is?

A. I couldn't tell, I don't know how long it has been there.

Q. Been there twenty years?

A. I said I couldn't tell; it is there, I am satisfied of that, I see it every day.

Q. It may have ben there twenty years, it may have been built in 1890, for all you know?

A. I don't know—it wasn't built at that time, I am quite sure it was built later than that.

Q. How much later?

A. I can't tell you exactly, I won't say what time it was built there.

Q. State approximately to the Court.

A. You have the time there.

MR. COBB—We object to this as not proper cross-examination.

Objection sustained.

This was all the testimony offered upon this issue.

Defendants were apparently satisfied that the values placed upon it by the plaintiff were none too high, for although "upon trial a large amount of evidence was introduced," (Rec. 100) the defendants

offered none tending to show a less rental value than the estimate placed upon it by the plaintiff.

The Court in its written opinion, said:

“The plaintiff himself testified and attempted to qualify as an expert on the rental value of his property which the defendant had been withholding from him. This was merely opinion upon his part and the Court is not inclined to be bound by his opinion nor follow the rule by which he arrived at the rental value, as there was no other evidence on this question; he will be allowed the nominal amount of \$10.00 for the detention of all parcels of property hereby awarded him during the time herein involved.” (Rec. 112.)

We respectfully take issue with the expression “attempted to qualify.” We think he did qualify. If a resident of a town for 23 years, renting a large amount of property therein both for himself and others, some adjoining, and in the immediate vicinity of the property in controversy is not qualified to testify, as to rental value, it would be difficult to find a person who was. Besides defendants made no objection to the testimony on the ground that the witness had not qualified. They were satisfied with his qualification.

We also take issue with the statement that is was “merely opinion.” It was opinion of course; all such testimony is **OPINION**; but it was “opinion founded on knowledge,” and was entitled to the

same weight as positive testimony of a fact; values as a rule can be proved in no other way. Opinion founded upon knowledge of the subject is evidence of the fact of value.

“For evidential purposes,” says Judge Wigmore, “Sale-Value is nothing more than the nature or quality of the article as measured by the money which others are willing to lay out in purchasing it. Their offers of money not only indicate the value; they are the value.” Wigmore on Ev. Vol. 1, Sec. 463.

That opinion based upon knowledge is the only possible evidence of value, see the able disquisition of the author on the “Opinion Rule” Vol. 3, Sec. 1940 to 43, same work.

The witnesses testimony showed that it was based upon many years experience in renting similar and contiguous property. He gave the prices at which such property rented. If this had not been true defendant could easily have shown it. But no such attempt was made. Was the Court then bound by this evidence?

We think it was; and that it was error to arbitrarily disregard it, and give only nominal damages. It is not a case of conflicting evidence, but a total disregard of the entire evidence.

Nor is it unjust or inequitable for the plaintiff to recover the \$1200.00 or more which the evidence entitled him to. For defendant, McGrath, has vin-

dictively litigated this matter and held possession for more than ten years. Defeated in the Land Office, he persists in litigating in the Courts. In the meantime he uses and collects rents from plaintiff's property.

FOURTH ASSIGNMENT OF ERROR

"The Court erred in adjudging that each party pay their own costs, and in not adjudging that plaintiff recover costs of the defendants." (Rec. 91.)

The Court gave as a reason for this ruling:

"Plaintiff by his complaint sought to recover all of Lot 2 Block 3, the greater part of which was held by defendant under Trustees deed and covered with valuable improvements of the defendant." (Rec. 112.)

In this statement the Court fell into a mistake. It is true that in the 1st paragraph of 2nd cause of action (Rec. 4) the statement is inadvertantly made that "plaintiff is the owner and entitled to the possession of Lots 2 and 3," etc. But in the next paragraph the portion actually sued for is carefully described. There was no claim made at any time that plaintiff was entitled to any property not embraced in the deeds from the trustee.

Not only so, but the Court in making said ruling disregarded a mandatory provision of the Alaska Code. Sec. 510, Carter's Code Part IV. provides:

“Costs are allowed of course to the plaintiff upon a judgment in the district court in his favor in the following cases:

“First: In an action for the recovery of the possession of real property” etc.

Sec. 514 leaves the matter of costs discretionary with the Court in equity cases. But there is no discretion given in a law case such as the one at bar.

This was an action to recover the possession of real property. The plaintiff had judgment and was entitled to costs as a matter of right.

Bentley vs. Jones 7 Or. 108.

Crossman vs. Landers 3 Or. 495.

And the rule is the same in the Federal Courts.

Trinidad Asphalt Paving vs Robinson, 52 Fed. 347.

For the errors alleged it is respectfully submitted that the judgment of the Court should be reversed with directions to the lower Court to enter a judgment for all the premises sued for and for damages at the rate of ten dollars per month from May 1st, 1901, the beginning of the six year period next before the commencement of the action, for costs in the lower Court and for costs on this writ of Error.

J. H. COBB,

Attorney for Plaintiff in Error.

No. 2016.

IN THE

United States Circuit Court of Appeals

NINTH JUDICIAL CIRCUIT

EMERY VALENTINE,

Plaintiff in Error,

VS.

M. J. HYNES, as Administrator of the
Estate of J. J. McGrath, Deceased, and
S. HIRSCH,

Defendants in Error.

**BRIEF FOR THE DEFENDANTS IN ERROR AND
PRAYER FOR DISMISSAL OF WRIT OF ERROR.**

R. F. LEWIS,

Attorney for Defendants in Error.

Filed this.....day of.....A. D. 1912.

F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

FILED

MAY 1912

No. 2016.

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S. HIRSCH,

Defendants in Error.

BRIEF FOR THE DEFENDANTS IN ERROR AND PRAYER FOR DISMISSAL OF WRIT OF ERROR.

Before discussing the merits of this case we desire to call attention to the fact that the proper method of bringing the matter before this Court has not been followed.

While it is true that the action as originally commenced was in ejectment, it is also a fact that the defendant below in addition to his answer filed a cross-complaint (Trans., p. 14), wherein he seeks to secure equitable relief against the plaintiff. The plaintiff answered the issues tendered by this cross-complaint (Trans., p. 57) and by so doing and not objecting in

any way submitted himself to the jurisdiction of the equity side of the Court.

O'Hara v. Parker, 39 Pac. 1004, at 1007 (Oregon).

The Court in rendering judgment recognized the fact that equity had taken jurisdiction, for it was adjudged that the parties each pay their own costs and also that the plaintiff be enjoined from claiming or entering into possession of a portion of the premises in controversy. (Trans., pp. 76-77.) The legal issues presented in the trial below were with two exceptions adjudicated in favor of the plaintiff in error and his appeal is directed mainly toward a reversal of the decision of the Court enjoining him from attempting to take possession of a portion of the land in dispute and from the order requiring each party to assume his own costs.

If the Court will examine the record it can easily be seen that the equities in this case are with the defendant in error. It appears that many years before this action was commenced he had built a building on what he supposed was his own land, but as a matter of fact was in conflict with his neighbor, who was cognizant of the situation but failed to notify defendant. The areas in conflict are shown on the plat at page 72 of the Transcript. After defendant's building had been constructed a patent for the townsite of Juneau was issued and each person in possession of property in the townsite was required to file an application covering the land actually occupied by him at the date of the townsite entry. Through an error of his surveyor

the defendant failed to properly describe the land occupied by him, with the result that the plaintiff received title to the portions of land under defendant's buildings, which are shown on the plat in pink. (Trans., p. 72.)

Some nine years after the plaintiff had secured his title to the conflicting parcels he commences an action in ejectment, claiming damages to the amount of \$1500, and asking for a restitution of the premises.

This is the second time the cause has been before this Court and we ask that this writ of error be dismissed and the litigation ended, on the ground that the plaintiff in error should have brought the cause to this Court by appeal instead of by writ of error.

R. F. LEWIS.

Attorney for Defendants in Error.

BRIEF ON THE MERITS.

Ejectment brought by the plaintiff Emery Valentine to recover certain portions of several lots in Juneau, Alaska. The defendant McGrath answered and also filed a cross-complaint for the purpose of securing equitable relief. The plaintiff answered the defendants' cross-complaint.

The property in controversy herein is shown on the plat at page 72 of the Transcript.

The plaintiff sued for all of lots one (1), two (2) and three (3) in block three (3) and a portion of block "G" as shown on the plat. Judgment was given for the plaintiff only for the portions indicated by the pink coloring on the plat, and excepting the portion in

pink near the lower edge of the plat and marked "cornice."

The plaintiff in error has assigned error on four grounds: The first is that the Court erred in not awarding to the plaintiff the property described in plaintiff's third cause of action (Trans., p. 5), being that portion marked "cornice" on the plat. The action of the Court was entirely justifiable in our opinion for the following reason:

On the first trial of this cause in the Court below, on motion of the plaintiff Valentine, this third cause of action was dismissed as appears in the Transcript of the record in said cause on file with this Court, the case having been before this Court on a writ of error taken by the defendant J. J. McGrath.

(See Transcript cause No. 1610, *J. J. McGrath et al. v. Emery Valentine*, motion by plaintiff Valentine to dismiss as to third cause of action, page 17, judgment of dismissal, pages 19-20.)

There is nothing in either of the records before this Court to show that this judgment of dismissal as to the third cause of action has ever been set aside or modified in any way.

In the former appeal in this case neither the defendant McGrath nor plaintiff Valentine appealed from the judgment of dismissal as to the third cause of action, and so the same became final.

The fact that on the retrial of the case below the same pleadings were used as on the trial in the former case would not serve to set aside the judgment which appears in the records before this Court.

On page 14 of the plaintiff's brief we find the following language:

"Both parties proceeded upon the theory that the premises in question were still in controversy and both sides presented evidence in full upon their respective titles."

The foregoing statement is not justified, for there is nothing in the record before this Court to indicate that such was the case. The only testimony to be found in the Transcript being that relating to the rental value of the property in controversy. (Trans., pp. 79-86.)

It was held in *Darling v. Polack*, 18 Cal. 625, as follows:

"In effect a dismissal is a final judgment in favor of the defendants, and although it may not preclude the plaintiff from bringing a new suit, there is no doubt that for all purposes connected with the proceedings in the particular action the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits."

See, also,

Leese v. Sherwood, 21 Cal. 151.

The second assignment of error covers that portion of the judgment of the Court below dealing with the small triangle of ground lying at the southeast corner of lot one (1) in block three (3), as shown on the plat at page 72 of the Transcript, and described in plaintiff's first cause of action. (Trans., p. 3.)

We are inclined to agree with the plaintiff in error on most of the points which he makes in support of this assignment of error, and the only ground under the

findings of the Court on which the judgment as entered can be supported is that on account of the small area involved, the Court might be justified in applying the doctrine *de minimis non curat lex*.

As to the third assignment of error it seems clear that the Court below was entirely justified in awarding only nominal damages. But before discussing the merits of this assignment we desire to call attention to the fact that the so-called bill of exceptions covering pages 78-88 of the Transcript should not be considered as a part of the record for the following reason:

The time within which the trial judge was authorized to settle a bill of exceptions in the case had expired long before any step was taken by the plaintiff in error.

The judgment was entered June 21, 1910 (Trans., p. 77.) The bill of exceptions was signed and settled June 3, 1911. There is nothing in the record to indicate that any order extending the time had ever been made and no waiver or stipulation appears to have been made by the defendants in error. As this is an appeal from a judgment involving issues of an equitable nature we contend that the rule announced in *Dalton v. Hazelet*, 182 Fed. 560, applies:

“Carter’s Alaska Code, section 372, providing that exceptions prepared and settled shall be filed with the clerk within ten days from the entering of the decree or such time as the court may allow, exceptions not filed with the clerk until more than six months after the entering of the decree without an order extending the time were nugatory.”

In spite of the arguments and explanations of the

plaintiff in error, the fact remains that he commenced an action claiming the greater portion of the land on which the building of the defendant in error McGrath stands (Trans., p. 4, par. 1), and the Court did not award to the plaintiff in error all of the land which he sought to recover. The Transcript, pages 79 to 86, contains the evidence on which the plaintiff in error attempted to establish the amount of damages to which he was entitled. There is no testimony in the record which shows definitely or even approximately what the rental value of the ground awarded the plaintiff amounted to. The only witness who testified was the plaintiff himself, and his testimony was to the effect that property in the vicinity had a certain rental value per front foot; also that cabins on lands similar to a portion of the land in controversy were rented by him at a certain figure.

In view of the absence of any positive testimony showing the value of the land in dispute or its rental value, the Court was entirely justified in awarding only nominal damages.

As the cause was tried before the Court alone, a jury having been waived, the finding of the Court as to the rental value has the same force and effect as the verdict of a jury.

Carter's Alaska Code, chapter 19, section 210, page 186, reads as follows:

"The order of proceedings on a trial by the Court shall be the same as provided in trials by jury. The finding of the Court upon the fact shall be deemed a verdict, and may be set aside

in the same manner and for the same reasons, as far as applicable, and a new trial granted."

It follows that so long as there was any basis at all on which the Court below made its finding, the same will not be disturbed on appeal. This question has been decided so often by this Court that a citation of authorities is unnecessary.

The fourth assignment of error deals with the matter of costs. The plaintiff in error argues that costs should have been awarded him as a matter of course. His position in this regard would have been stronger had the Court awarded him all the land which he sought to recover; this, however, the Court did not do. Furthermore, the controversy before the Court below was not merely an action at law in which the plaintiff sought restitution of the premises in controversy, but by reason of the cross-complaint of the defendant below the case was brought within the jurisdiction of the equity side of the Court. (Trans., p. 14.) The plaintiff below answered the issues (Trans., p. 56) tendered by the cross-complaint and thus waived any objection to the exercise of equity jurisdiction by the Court.

O'Hara v. Parker, 39 Pac. 1004, at 1007.

Chapter 52, part 4, page 254, Carter's Alaska Code, section 514, reads as follows:

"In an action of an equitable nature costs and disbursements shall be allowed to a party in whose favor a judgment is given in like manner and amount as in other actions without reference to

the amount recovered or the value of the object of the action, *unless the Court otherwise directs.*" (Italics ours.)

The above section is identical with section 554 of Hill's Oregon Code, which has been construed in *Cole v. Logan*, 33 Pac. 568, at 571.

The Court say:

"This (meaning the above provision) invests the trial Court with discretion in the taxation of costs and disbursements, and such discretion will not be reviewed except for an abuse thereof."

We submit that under the circumstances shown in this case there was no abuse of discretion on the part of the Court below, and call attention to finding of fact No. 10 (Trans., p. 69, bottom), as follows:

"The Court further finds that there is a two-story building costing about \$4000 standing upon defendant's ground and which encroaches upon and covers that portion of Lot One (1) in Block One (1) (should be Block 3 note) in controversy herein; that at the time of the erection of the building no notice was given the owner of this small encroachment but the building was permitted to be completed without objection."

On page 15 of plaintiff's Brief the language quoted above is amplified so that it appears that the question of notifying the defendant had been considered by plaintiff's predecessor in title, thus showing conclusively that although he knew of the situation he stood by and allowed the defendant in error who was in ignorance of the encroachment to erect his building. After a

lapse of almost ten years the plaintiff brings this action seeking to recover a large sum as damages for the withholding of these insignificant little pieces of ground.

Respectfully submitted,

R. F. LEWIS,
Attorney for Defendants in Error.

No. 2017

United States
Circuit Court of Appeals
For the Ninth Circuit.

VICTOR VON ARX,

Plaintiff in Error,

VS.

A. J. BOONE,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for
the District of Alaska, Division No. 1.

FILED

OCT 26 1911

No. 2017

United States
Circuit Court of Appeals
For the Ninth Circuit.

VICTOR VON ARX,

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A. J. BOONE,

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the District of Alaska, Division No. 1.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Complaint.

The above-named plaintiff, complaining of the above-named defendant, for cause of action alleges:

I.

That at all the times hereinafter mentioned, the plaintiff was, and is now the owner, except only as against the United States, and was, and is entitled to the possession of the following described lot, tract, or parcel of land, to wit:

Situated on Douglas Island, about 500 feet north of the old Bear's Nest Mill, on the beach or tide land of Gastineaux Channel, and being that certain lot and building thereon known as the The Beach Store and Lodging-house; also the two lots and frame buildings thereon immediately adjoining said Beach Store premises on the north.

II.

That the plaintiff and defendant both claim said property under a common source of title, to wit, one Edward Erlich, but the plaintiff's title is prior and superior to the claim of title asserted by the defendant, and the pretended title of the defendant is worthless and of no force or effect.

III.

That heretofore, to wit, on or about the 18th day of July, 1910, the defendant entered upon said premises

wrongfully and without right, and has ever since, and still does, withhold from the plaintiff the possession thereof, to his damage in the sum of \$1,000.00. That the reasonable rental value of said property is the sum of seventy-five dollars per month.

Wherefore plaintiff prays for judgment for the restitution of said property, for damages for the withholding thereof, and for costs of this action, and general relief.

MALONY & COBB.

Attorneys for Plaintiff. [1*]

United States of America,
District of Alaska,—ss.

Victor Von Arx, being first duly sworn, on oath deposes and says: I am the plaintiff above named. I have read the above and foregoing complaint, know the contents thereof, and the same is true as I verily believe.

VICTOR VON ARX.

Subscribed and sworn to before me this 12th day of October, 1910.

[Seal]

GUY McNAUGHTON,
Notary Public for Alaska.

[Endorsed]: Original. No. 819-A. In the District Court for Alaska, Division No. 1, at Juneau. Victor Von Arx, Plaintiff, vs. A. J. Boone, Defendant. Complaint. Filed Oct. 22, 1910. H. Shattuck, Clerk. By ———, Deputy. Malony & Cobb, Attorneys for Plff. Office: Juneau, Alaska. [2]

*Page number appearing at foot of page of original certified Record.

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Answer.

I.

Answering paragraph I of plaintiff's complaint, defendant denies that at all times mentioned in his complaint plaintiff was the owner, except only as against the United States, of the property described in his complaint; denies that plaintiff is now the owner, except only as against the United States, of said property; and denies that plaintiff was or is entitled to the possession of all or any part or parcel of said property described in paragraph I of plaintiff's complaint.

II.

Answering paragraph II, defendant denies that plaintiff and defendant both claim said property under a common source of title, to wit, one Edward Ehrlich; denies that plaintiff's title is superior to the claim of title asserted by defendant's denies that the pretended title of defendant is worthless and of no force or effect; denies that plaintiff has any title or claim of title to said property or any part thereof.

III.

Answering paragraph III, defendant denies that

on or about July 18, 1910, defendant entered upon said premises wrongfully and without right; denies that plaintiff has suffered damage to the extent of One Thousand Dollars (\$1,000.00) or any other sum at all; denies that the reasonable rental value of said property is Seventy-five Dollars (\$75.00) per month, or any greater sum than Thirty [3] Dollars (\$30.00) per month. Defendant admits that he was in possession of said premises on July 18, 1910, and for a long time prior thereto, and that he is now in possession of all of said property.

IV.

Further answering plaintiff's complaint, defendant alleges:

First. That at the time of the commencement of the above-entitled action, defendant was the owner, as against everyone except the United States, and in possession of the following described lot, tract, or parcel of land described as follows, to wit: Situated on Douglas Island, Alaska, about five hundred feet north of the old Bear's Nest Mill, on the beach or tide land of Gastineaux Channel, and being that certain lot and building thereon known as the Beach Store and Lodging-house; also the two lots and frame buildings thereon immediately adjoining said Beach Store premises on the north. That defendant has been in the actual possession of all of said property ever since May 2, 1910. Defendant further alleges that said property above described is the same property for the recovery of which this suit is brought.

Second. That the nature of defendant's title to said property above described is as follows: (1st)

actual possession prior to and at the commencement of this action. (2d) That heretofore, to wit, on March 5, 1910, one Edward Ehrlich became the owner of all the property above described by virtue of two deeds of conveyance from D. A. Sutherland, U. S. Marshal for the District of Alaska, Division No. 1; said deeds are recorded in the office of the District Recorder at Juneau, Alaska, in Book 22 of Deeds, at pages Nos. 348 and 351. That on March 9, 1910, when said Edward Ehrlich was still the owner of said property, the United States Marshal for the District of Alaska, Division No. 1, levied upon all the right, title and interest of the said Ehrlich in and to all of said property, under a writ of execution duly issued out of this Court, upon a judgment in favor of one J. M. Jenne in Cause No. 667-A of the records of this Court, entitled [4] J. M. Jenne, Plaintiff, vs. Edward Ehrlich, Alec Smallwood and L. A. Slane, Defendants. And thereafter such proceedings were had that on May 2, 1910, said property, together with all the right, title, interest and estate of said Edward Ehrlich, therein, was sold by said United States Marshal at public sale to this defendant for the sum of \$825.00 (eight hundred, twenty-five dollars) cash. That thereafter the said Marshal executed and delivered to defendant a certificate of purchase for the said property which is in words and figures as follows, to wit:

“Certificate of Purchase.

United States of America,
District of Alaska,—ss.

I, H. L. Faulkner, United States Marshal of the

said district of Alaska, Division No. 1, do hereby certify that by virtue of a certain writ of Fieri Facias (or execution) issued out of and under the seal of the United States District Court for the District of Alaska, Division No. 1, on the eighth day of March, A. D. 1910, in cause No. 667-A, in favor of J. M. Jenne, Plaintiff, and against Edward Ehrlich, Defendant, directed and delivered to Daniel A. Sutherland, the then United States Marshal, for the District of Alaska, Division No. 1, and to his deputies, he the said Daniel A. Sutherland, as such United States Marshal for said District and Division, did on the ninth day of March, A. D. 1910, levy upon all the right, title, interest and estate had, owned or held by the said Edward Ehrlich, defendant in the above-entitled cause, on the eighth day of December, 1908, or at any time thereafter of, in and to the following described real estate located, lying and being at Douglas in said Division and District of Alaska, to wit, that certain lot, piece, or parcel of land known as the Beach Store and Lodging-house and the two lots adjoining same on the north together with all the buildings and improvements thereon, said property being located on the beach about five hundred feet north of the old Bear's Nest Boarding-house in the town of Douglas, Alaska. And that thereafter I, H. L. Faulkner, as United States Marshal for the District of Alaska, Division No. 1, did, on the [5] second day of May, A. D. 1910, at the front door of the United States Courthouse at the hour of two o'clock P. M. of said day and in the manner provided by law, and after duly advertising said property ac-

ording to the statutes in such cases made and provided, sell at public sale to A. J. Boone of Douglas, Alaska, for the sum of eight hundred, twenty-five dollars, \$825.00, lawful money of the United States, the said A. J. Boone being the highest and best bidder and that being the highest sum bid for the same at said sale, all the right, title and interest of said defendant, Edward Ehrlich, of which he was seized and possessed on the ninth day of March, 1910, the date of said levy, or at any time afterwards, of, in and to that certain lot, piece or parcel of land known as the Beach Store and Lodging-house and the two lots adjoining same on the north, said property being located on the beach about five hundred feet north of the old Bear's Nest Boarding-house in the town of Douglas, Alaska, together with the hereditaments and appurtenances thereunto belonging.

And I do further certify that the purchase money so bidden at said sale has been paid to me and that said sale will become absolute and the said A. J. Boone or his assigns will be entitled to a deed of conveyance of the said land within twelve months from the date of confirmation of said sale unless the same shall be sooner redeemed according to the statute in such case made and provided.

Given under my hand, this second day of May, A. D. 1910.

(Signed) H. L. FAULKNER,
United States Marshal for the District of Alaska,
Division No. 1."

That said certificate of purchase was duly recorded in Book 22 of Deeds, on page No. 369 of the records

of the District Recorder at Juneau, Alaska, on May 4, 1910, at the hour of ten o'clock in the forenoon of said day.

WHEREFORE defendant prays judgment, first, that plaintiff is not entitled to the possession of the property described in his complaint. Second, that defendant is the owner, as against all persons except the United States, and entitled to the possession of said property. Third, that defendant recover his costs and disbursements expended in this action.

Z. R. CHENEY,

Attorney for Defendant. [6]

United States of America,
District of Alaska,—ss.

I, A. J. Boone, being first duly sworn, on oath say: That I am the plaintiff in the above-entitled action; that I have read the foregoing Answer and know the contents thereof, and believe the same to be true; that I make this verification *because*

A. J. BOONE.

Subscribed and sworn before me this seventh day of December, 1910.

[Seal]

Z. R. CHENEY,

Notary Public for Alaska.

I do hereby certify that the above and foregoing is a true, full and correct copy of the original herein.

_____,
Attorney for _____.

Due service of a copy of the within is admitted this 15th day of Dec., 1910.

J. H. COBB,

Attorney for Plaintiff.

[Endorsed]: No. 819-A. In the District Court for Alaska, Division No. 1, at Juneau. Victor Von Arx, Plaintiff, vs. A. J. Boone, Defendant. Answer. Filed Dec. 15, 1910. H. Shattuck, Clerk. By H. Malone, Deputy. Z. R. Cheney, Attorney for Plff. Office: Juneau, Alaska, Lewis Block. [7]

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Reply.

Now comes the plaintiff by his attorneys, and for reply to the answer of the defendant alleges:

I.

Referring to the first paragraph of said affirmative answer, plaintiff admits that defendant was in possession of the property therein described at the time of the commencement of this action; but he denies all and singular the other and remaining allegations in said paragraph contained.

I.

Referring to the second paragraph of said affirmative answer, plaintiff denies that on March 5th, 1910, or at any other time since the year 1905, Edward Ehrlich became, or was the owner of the property described in the complaint by virtue of two deeds from D. A. Sutherland as Marshal for the District of Alaska, Division No. 1, or otherwise; and he tur-

ther denies that Edward Ehrlich was the owner or had any right, title or interest in said property at the time of the proceedings in said paragraph alleged. But the plaintiff admits that such proceedings constitute the nature and basis of the defendant's claim to said property.

MALONY & COBB,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

Victor Von Arx, being first duly sworn, on oath deposes and says: I am the plaintiff above-named. I have read the above and foregoing reply, know the contents thereof, and the same is true, as I verily believe.

VICTOR VON ARX.

Subscribed and sworn to before me this 27th day of December, 1910.

[Seal]

J. H. COBB,
Notary Public for Alaska. [8]

[Endorsed]: Original. No. 819-A. In the District Court for Alaska, Division No. 1, at Juneau. Victor Von Arx, Plaintiff, vs. A. J. Boone, Defendant. Reply. Filed Dec. 29, 1910. H. Shattuck, Clerk. By E. W. Pettit, Deputy. Malony & Cobb, Attorneys for Plff. Office: Juneau, Alaska. [9]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Judgment.

This cause came regularly on for trial on January 9, 1911, upon the complaint, answer, and reply and the evidence submitted by the respective parties, before the Honorable Thomas R. Lyons, Judge of the above-entitled court, and a jury of nine good and lawful men, duly empaneled, qualified and sworn well and truly to try the issues and a true verdict render; the right of trial by a jury of twelve having been waived by both parties in open court and both parties having consented to a trial by the nine jurors chosen: and

Whereas said cause was then duly and regularly tried by and before said Judge and jury: and

Whereas after the close of the evidence, both parties having rested the case, plaintiff having made a motion for an order directing the jury to return a verdict for plaintiff, and said motion having been considered and overruled; and defendant having made a motion for an order directing a verdict in his favor, upon consideration thereof and after argument by counsel, the Court did grant said motion and did direct the jury to return a verdict for the defendant.

Whereupon the jury, under the order and instruction of the Court, rendered and returned the following verdict, to wit:

*“In the District Court for the District of Alaska,
Division No. 1, at Juneau. [10]*

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Verdict.

We, the jury selected, impanelled and sworn to try the issues in the above-entitled cause, do find that the plaintiff is not entitled to the possession of the property described in the complaint or any part thereof.

Juneau, Alaska, January 10, 1911.

CLAUD ERICSON.

ALEX WHITE.

M. J. KELLY.

SAMUEL KEIST.

HARRY J. FISHER.

J. T. MARTIN.

SEVERIN STEPHENSAN.

STEVE RING.

LOLOLA HARPER.”

Which said verdict was returned, received and filed in the presence of the jury, the respective counsel for the parties, and the Court, on the tenth day of January, 1911; and

Whereas, in due time thereafter, the defendand did

make and file herein his certain motion for a new trial of said cause, which said motion was, after argument by counsel, upon due consideration, overruled by the Court:

NOW, THEREFORE, on motion of Z. R. Cheney, attorney for defendant, the attorney for plaintiff being present, and premises considered,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff is not entitled to the property described in his complaint, or any part thereof; [11]

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that defendant have and recover from the plaintiff his costs and disbursements herein by him expended to be taxed by the Clerk, taxed at \$33.90.

Done in open court at Juneau, Alaska, January 25th, 1911.

THOMAS R. LYONS,

Judge of the District Court for the District of Alaska,
Div. No. 1.

[Endorsed]: No. 819-A. In the District Court for Alaska, Division No. 1, at Juneau. Victor Von Arx, Plaintiff, vs. A. J. Boone, Defendant. Judgment. Filed Jan. 25, 1911. H. Shattuck, Clerk. By H. Malone, Deputy. Z. R. Cheney, Attorney for Deft. Office: Juneau, Alaska, Lewis Block. [12]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Bill of Exceptions.

Honorable THOMAS R. LYONS, Judge.

JOHN H. COBB, Esq., for Plaintiff.

Z. R. CHENEY, Esq., for Defendant. [13]

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Bill of Exceptions.

Be it remembered that on the trial of the above-entitled and numbered cause the following proceedings were had, to wit: [14]

Honorable THOMAS R. LYONS, Judge.

JOHN H. COBB, Esq., appearing for Plaintiff.

Z. R. CHENEY, Esq., appearing for Defendant.

[Proceedings Had January 9, 1911.]

Now on this, the 9th day of January, 1911, at ten o'clock in the forenoon of said day, the above-entitled

matter coming on for trial before the Honorable Thomas R. Lyons, Judge of the District Court for the First Division of the District of Alaska; and the parties to said action appearing in person and by their respective counsel; and the Court having denied the motion of the plaintiff for judgment on the pleadings, and allowing an exception to said ruling; and thereupon a jury of nine men being duly selected and qualified upon their *voir dire*; and the respective parties hereto having accepted and stipulated in open court that the said cause be tried before a jury of nine men, thereupon the following proceedings were had, to wit: [15]

Mr. COBB.—(Makes opening statement to Jury).

Mr. CHENEY.—I don't think I have any statement to be made at this time, your Honor. I don't concede there are any facts for the jury to try in this case.

COURT.—Very well. Call your first witness.

Mr. COBB.—We offer the records first.

Mr. CHENEY.—If the Court please, in order to preserve my record I would like to object to the introduction when he offers this evidence—the introduction of it.

COURT.—Very well.

Mr. CHENEY.—Might as well state my objections now—suppose he is going to offer—

COURT.—I submit Mr. Cheney it will be better to wait until the offer is made so your record will be in a better condition.

[Certain Offers in Evidence.]

Mr. COBB.—We first offer in evidence the deed from Edward Ehrlich to Alexander Smallwood. It is dated the 13th day of February, 1905, and recorded in book 20 of records of deeds of the Juneau Recording District, beginning at page 373. It conveys the property in controversy—

Mr. CHENEY.—We object now, if the Court please—the defendant objects to the introduction of any testimony in this case for the reason that the complaint does not state facts sufficient to constitute a cause of action; that is the general objection I wish to make, and then I want to make—want to object.

COURT.—Very well. Just examine the deed. The deed describes the identical property, does it, Mr. Cobb?

Mr. COBB.—Yes, sir; together with a lot of other property, houses, included in it. I will read that part [16] of it.

COURT.—Dated—what is it, again?

Mr. COBB.—Date of it is 13th day of February, 1905.

Mr. CHENEY.—That deed conveys a whole lot of property. It is pretty hard to tell very much about it. Defendant objects to the introduction of the deed on the ground that it is indefinite and uncertain as to the property described in the deed.

COURT.—I wish you would read it.

Mr. COBB.—I will read the part of it pertaining to this property. [17]

COURT.—The objection may be overruled and the deed admitted in evidence.

[Plaintiff's Exhibit No. 1.]

Plaintiff's Ex. 1 Rec'd in Ev. R. E. R.

“KNOW ALL MEN BY THESE PRESENTS, that I, Edward Ehrlich of Douglas, Alaska, party of the first part, for and in consideration of the sum of \$330 (Three hundred and thirty dollars) lawful money of the United States of America, to me in hand paid by Alexander Smallwood, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, remise, release and forever quitclaim unto the said second part and unto his heirs, executors, administrators and assigns forever, all my right, title and interest in and to the following described parts and parcels of land, situate and being in Douglas and Treadwell, Alaska, together with the buildings, houses, structures and room fixtures thereon, more [18] particularly described as follows, to wit:

“That certain lot and building thereon known as the ‘Beach Store’ within the exterior boundaries of the City of Douglas, being situate on the beach of Gastineaux Channel in front of the Julia Lode Mine, said lot and buildings being about four hundred and fifty (450) feet in a northwesterly direction from the northwesterly line of Treadwell City, said lot being seventy-four feet by forty-nine feet, and the building thereon being forty-two feet by forty-two feet;

“Also that certain lot and buildings thereon adjoining said above described lot on the north and extending along the line of the Alaska Treadwell Gold Mining Company's railroad track *track* about forty-

two feet and extending westerly from said railroad track forty-two feet in width and the building erected thereon being thirty-two feet by twenty-six feet in dimensions;

“Also that certain lot and buildings thereon adjoining last above described lot on the north and extending along the line of the Alaska Treadwell Gold Mining Company’s railroad track a distance of thirty-five feet and extending in a westerly direction from said track a distance of twenty-five feet being covered with a platform;

“Also that certain lot and building and structures thereon, on the beach of Gastineaux Channel, and extending back over and including a portion of the high land abutting on said beach; said lot being situate about seven hundred feet in a northwesterly direction from the northwest line [19] of Treadwell City, being twenty-seven feet in distance up and down said beach, and nineteen feet in width and being covered by a cabin and platform;

“Also one two room house situated on the tide land on the west side of Gastineaux Channel east of the Julia Lode claim known as Lot No. 102, about five hundred and twenty feet northwest from post No. 4 of said Julia Lode claim and about forty-seven and one-half feet southwest from the Alaska Treadwell Gold Mining Company’s beach railroad track;

“Also that certain lot or parcel of ground with dwelling house and out-buildings thereon located on the beach of Gastineaux Channel in the townsite of Douglas, more particularly described and located as follows, to wit: the northeast corner of lot begins at

a point about two hundred and four (204) feet from center of Bears Nest Tunnel in a northwesterly direction, having a frontage on the beach of Gastineaux Channel thirty-four (34) feet and extending back in a southwesterly direction twenty-six (26) feet, with the dwelling and out-houses thereon;

“All of the above and foregoing described property being within the exterior boundaries of the City of Douglas, Alaska;

“Also that certain lot and buildings thereon, and fixtures contained therein, on the beach in front of the Treadwell Mining Claim being situate about two hundred and ninety-four (294) feet in a northwest direction from the center of the [20] mouth of the tunnel on the Seven Hundred Mining claim, the mouth of said tunnel being near the northwest corner of said Seven Hundred Mining claim, the size of the building erected thereon being twenty-five feet by twenty-five in dimensions, and the size of said lot being twenty-seven feet by twenty-two feet in dimensions;

“Said lot and buildings thereon being within the present exterior boundaries of the City of Treadwell, Alaska;

“As a part of the consideration of this transfer second party agrees to assume and pay and does hereby assume the following described obligations of first party;

“(First) Note and mortgage to S. Sloan, dated June 30, 1902, for the sum of Four Hundred (\$400) Dollars;

“(Second) Note and mortgage of Martin Jenne,

dated October 1, 1902, for the sum of One thousand (\$1000) Dollars, with overdue interest thereon amounting to \$25.75;

“(Third) Note and mortgage of Joe Haddock, dated Dec. 1, 1904, for One hundred (\$100) dollars due July 1, 1905;

“(Fourth) Note and mortgage to Joe Haddock, dated Dec. 1, 1905, for One hundred fifty (\$150) dollars due Dec. 1, 1905;

“(Fifth) Note to Sam N. Ullrich dated Feb. 2, 1905, for three hundred (\$300) Dollars at six per cent, due August 2, 1905; [21]

“First party is hereby relieved by second party of all debts, responsibility or obligation by reason of said notes and mortgages;

“To have and to hold the same together with all and singular the tenements, and appurtenances thereunto belonging or in anywise appertaining, unto the said party of the second part, and to his heirs, executors, administrators and assigns forever;

“In Witness Whereof the said first party has hereunto set his hand and seal this 13th day of February, 1905.

“ED. EHRLICH.

“ALEX. SMALLWOOD.

“Signed, sealed and delivered in presence of

“JAMES HENRY LESIMAN.

“EDGAR J. WRIGHT.

“United States of America,
District of Alaska,—ss.

“This is to certify that before me a notary public for the District of Alaska, duly commissioned and

sworn, personally came on this 13th day of February, 1905, Edward Ehrlich and Alexander Smallwood, to me known to be the persons described in and who executed the within instrument and acknowledged to me that they signed and sealed the same freely and voluntarily and for the uses and purposes therein mentioned.

“Witness my hand and seal the day and year above written.

[Seal]

“EDGAR J. WRIGHT,

“Notary Public, District of Alaska.

“Filed for record at 2.55 P. M. Feb. 13, 1905.

“H. H. FOLSOM, Recorder.” [22]

Mr. CHENEY.—You claim that is the same property described in your complaint?

Mr. COBB.—The beach store.

Mr. CHENEY.—The next building—

Mr. COBB.—There are some others relating to it though—“That certain lot and buildings thereon adjoining last above-described lot on the north and extending along the line of the Alaska Treadwell Gold Mining Company’s railroad track a distance of thirty-five feet and extending in a westerly direction from said track a distance of twenty-five feet, being covered with a platform; also that certain lot and building and structures thereon, on the beach of Gastineaux Channel and extending back over and including a portion of the high land abutting on said beach.”

Mr. CHENEY.—Object to that.

Mr. COBB.—That part of it is not in controversy.

COURT.—I think you have already described that, Mr. Cobb, all the property described in your complaint.

Mr. COBB.—I believe it is.

Mr. CHENEY.—Just two pieces of property—the beach store and lodging house and the two lots and store adjoining the lodging-house on the north.

Mr. COBB.—I believe that is all the property in controversy described there.

Mr. CHENEY.—I move if the Reporter got that last—this lower part of the upland, that the Reporter be instructed to strike that out.

COURT.—Yes; that may be stricken out, but the deed may be admitted in evidence and the objection to it [23] overruled.

Mr. CHENEY.—That is the part that is admitted is what I read to the jury.

COURT.—Yes, sir; I suppose it may be proper for the Stenographer here later to copy the deed.

Mr. COBB.—Yes, sir; in case it is necessary.

COURT.—And the record should also show that the book read from is one of the records of the mining district in which the land is situated.

Mr. COBB.—I so stated.

COURT.—I didn't catch that.

Mr. COBB.—I want the stenographer also to take a memorandum of the date of recording. This instrument was filed for record at 2:55 P. M. February 13, 1905.

COURT.—You have already given the book and page, haven't you, Mr. Cobb?

Mr. COBB.—I gave him that. Then we next offer in evidence a power of attorney from Alex Smallwood to Edward Ehrlich, dated the 16th day of April, 1907, and recorded and filed in the records at 10:50

A. M. the 18th day of April, 1907, as recorded in volume 6 of the records of powers of attorney in the Juneau Recording District, page 177.

Mr. CHENEY.—Defendant objects to this power of attorney for the reason that it is incompetent, irrelevant and immaterial and doesn't tend to sustain any allegations of plaintiff's complaint and on the further ground that it is not properly executed and witnessed according to the provisions of the statutes of Alaska.

COURT.—How many witnesses are there to the instrument? [24]

Mr. CHENEY.—One.

COURT.—Is it acknowledged?

Mr. COBB.—Yes, sir; before John Henson, and signed "William Stubbins" as one witness.

After argument.

COURT.—Objection overruled; exception allowed. It is a general power of attorney.

Mr. COBB.—Will you read it; it is a general and full power of attorney.

Mr. CHENEY.—I don't care whether you read it or not.

Mr. COBB.—I will read it, unless you waive it. It is a general power of attorney.

COURT.—If you read it, the stenographer won't have to go to the record thereafter.

Mr. COBB.—

[Plaintiff's Exhibit No. 2.]

Plff's. Ex. 2. R. E. R.

"KNOW ALL MEN BY THESE PRESENTS:
That I, Alexander Smallwood, of Douglas, Alaska,

have made, constituted and appointed, and by these presents does make, constitute and appoint Ed. Ehrlich of same place, my true and lawful attorney for me and in my name, place and stead, and for my use and benefit to take full charge of all of my business in Douglas during my absence therefrom, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me, and to have, use and take all lawful ways and means in my name, or otherwise, for the recovery thereof, by attachments, [25] arrest, distress or otherwise, and to compromise and agree for the same, and to make, sign, seal and deliver acquittances, or other sufficient discharges for the same, for me and in my name, to bargain, contract, agree for, purchase, receive and take lands, tenements, hereditaments, and accept the seizen and possession of all lands and all deeds and other assurances in the law therefor, and to lease, let, demise, release, convey, mortgage and hypothecate lands, tenements and hereditaments, upon such terms and conditions and under such covenants as he shall think fit.

“Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in every way and manner deal in and with goods, wares and merchandise, choses in action and other property in possession or in action, and to release mortgages on lands or chattels, and to make, do and transact all and every kind of business of what nature and kind soever.

“And also for me and in my name, and as my act and deed, to sign, seal, execute and deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgages judgments and other debts, and such other instruments in writing, of whatever nature, as may be necessary or proper in the premises.

“Giving and granting unto him my said [26] attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present I Alexander Smallwood hereby ratifying and confirming all that my said attorney Ed. Ehrlich shall lawfully do or cause to be done, by virtue of these presents.

“In Witness Whereof I have hereunto set my hand and seal the 16th day of April, in the year of our Lord one thousand nine hundred and seven.

“ALEX SMALLWOOD. [Seal]

“Signed, sealed and delivered in presence of

“WM. STUBBIBS.

“United States of America,

District of Alaska,—ss.

“This is to certify that on this sixteenth day of April, A. D. 1907, before me, John Henson, a notary public in and for Alaska, duly commissioned and sworn, personally came Alexander Smallwood to me known to be the individual described in and who

executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

“Witness my hand and official seal, the day and year in this certificate first above written.

[Seal]

“JOHN HENSON,

“Notary Public in and for ————, Residing at
Douglas.

“Filed for record at 10:50 A. M., April 18th, 1907.

“H. H. FOLSOM,

“Recorder.”

We next offer in evidence a deed from Alexander Smallwood, by Edward Ehrlich, his agent and attorney in fact, to Victor Von Arx, the plaintiff in this suit, dated the 18th [27] day of July, 1910, signed, sealed and delivered in the presence of G. C. Winn and John G. Heid, and acknowledged before John G. Heid, notary public in and for the district of Alaska. This instrument filed for record 3 o'clock P. M., July 18, 1910, and recorded in book 22 of deeds, page 402.

COURT:—Describing the same property as described in the complaint?

Mr. COBB.—Yes, sir.

Mr. CHENEY.—Defendant objects to the introduction of this deed on the ground that it is incompetent and immaterial, and doesn't tend to sustain the allegations by the plaintiff, and that it is simply a quitclaim deed; that it conveys no legal estate in the property sufficient for plaintiff to recover in this action.

COURT.—Objection overruled. The deed may be

admitted and marked.

Mr. COBB.—I will read this deed.

[Plaintiff's Exhibit No. 3.]

Plff.'s Ex. No. 3. R. E. R.

“This Indenture made the 18th day of July, in the year of our Lord one thousand nine hundred and ten,

“Between Alexander Smallwood, by Edward Ehrlich, his attorney in fact, under power of attorney dated April 18, 1907, recorded in Book 6, page 177, of Powers of Attorney in the office of the recorder for Juneau Recording District, Alaska, Division No. I, the party of the first part, and Victor Von Arx, of Douglas, Alaska, the party of the second part, Witnesseth: That the said party of the first part, for and in consideration of the sum of Five hundred and twenty-six and no/100 dollars, lawful money of the United States of America, to him in hand paid by [28] *by* the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, the following-described property, to wit:

“That certain lot and building thereon known as the Beach Store and Lodging House, also two certain lots adjoining the above-mentioned lot on the north, together with the frame buildings thereon; also one certain foundation with all improvements thereon, situated immediately opposite and south of said Beach Store and Lodging House lot, across the rail-

road track from said Beach Store premises, and all of said above-described property being on the beach or tide land, about five hundred (500) feet north of the Bears Nest (old) mill, in the town of Douglas, Alaska;

“To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part, his heirs and assigns forever.

“In Witness Whereof, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

“ALEX SMALLWOOD. [Seal]

“By EDWARD EHRLICH, [Seal]

“His Agent and Attorney in Fact.

“Signed, sealed and delivered in presence of

“G. C. WINN.

“JOHN G. HEID.

“United States of America,
District of Alaska,—ss.

“This is to certify, that on this 18th day of July, A. D. 1910, before me, the undersigned, a notary public in and for the District of Alaska, duly commissioned and [29] sworn, personally came Edward Ehrlich as the attorney in fact of and for Alexander Smallwood formerly of Douglas, Alaska, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as the attorney in fact of and for said Smallwood and of his free and voluntary act and deed for the uses and purposes therein mentioned, and that he signed the name of

Alexander Smallwood as principal thereto, and his name as attorney in fact.

“Witness my hand and official seal the day and year in this certificate first above written.

[Seal]

“JOHN G. HEID,

“Notary Public in and for the District of Alaska, Residing at Juneau.

“Filed for resord at 3 P. M., July 18, 1910.

“H. H. FOLSOM,

“Recorder.”

COURT.—May I see the deed, Mr. Cobb?

Mr. COBB.—On the question of rental, why I will just offer in evidence the admissions of the defendant's answer and read from that—that is worth \$30 a month and ask the jury, under the instructions of the Court, that they find for the plaintiff—to return a verdict for that amount.

COURT.—Very well. [30]

[Plaintiff's Exhibit No. 4]

819-A. Plff. Ex. 4. RER.

“III.

“Answering paragraph III, defendant denies that on or about July 18, 1910, defendant entered upon said premises wrongfully and without right; denies that plaintiff has suffered damage to the extent of one thousand dollars (\$1,000.00) or any other sum at all; denies that the reasonable rental value of said property is seventy-five dollars (\$75.00) per month, or any greater sum than thirty dollars (\$30.00) per month. Defendant admits that he was in possession of said premises on July 18, 1910, and for a long time prior thereto, and that he is now in possession of

all of said property.” [31]

Mr. COBB.—That is the plaintiff’s case.

COURT.—Call your first witness, Mr. Cheney.

[Motion for Directed Verdict, etc.]

Mr. CHENEY.—If the Court please, I don’t believe plaintiff has made out a case under the law and I wish to move at this time that the Court instruct the jury at this time to return a verdict for the defendant; that the plaintiff take nothing by the action. It seems to me, your Honor—I don’t know as the Court wants to listen to an argument—but it seems to me that as the facts set up in the complaint and the evidence introduced by these quitclaims, which your Honor knows don’t amount to anything at all in that kind of property, no possession having been shown—simply the introduction of these deeds under this complaint, plaintiff *filed*, to prove a case.

Argument of counsel.

Mr. COBB.—I thought that under the pleadings it was a common source of title and we can show, I think, it is easy enough to prove possession of Mr. Ehrlich at that time.

COURT.—I think it would be safer.

Mr. COBB.—Very well, I will call Mr. Von Arx.

Mr. CHENEY.—I object to the reopening of the case.

COURT.—The case may be reopened; motion denied.

[Testimony of Victor Von Arx, the Plaintiff, in His Own Behalf.]

Whereupon VICTOR VON ARX, the plaintiff, was called and duly sworn and testified as follows on his own behalf:

Mr. COBB.—Q. State your name.

Mr. CHENEY.—What is the purpose of this now, your Honor? [37]

Mr. COBB.—I want to seek to show that Mr. Ehrlich had possession in 1905.

Mr. CHENEY.—All right.

Mr. COBB.—Q. State your name.

A. Victor Von Arx.

Q. You are plaintiff in this case? A. Yes, sir.

Q. Mr. Von Arx, where do you live now?

A. I live in Douglas.

Q. How long have you lived in Douglas?

A. I have lived in Douglas from 1903.

Q. Since 1903. Do you know Edward Ehrlich?

A. I know Edward Ehrlich; yes.

Q. How long have you known him?

A. Why, I know him when the first month that was first he come up.

Q. You knew him then in 1903, 4 and 5?

A. Yes, knew him.

Q. Was he in possession of this Beach property—Beach store in 1905, before he sold to Smallwood?

A. He was in the store on the piles—with his name on the store.

Q. Is he running a store?

A. Running a store, yes.

(Testimony of Victor Von Arx.)

Q. State whether or not he had improvements on this property and what they consisted of.

A. What improvements?

Q. Any houses on the property? Are there any houses on this property? [38]

A. On this property and houses—there is a house up there, that belonged in Beach store, but no more—there was after 1905—was it 1908—was Smallwood then away—was put in—

Q. What I am asking you now—at the time Edward Ehrlich had the property in the early spring of 1905 if he had buildings upon it, did he?

A. Yes.

Q. Was running a store there? A. Yes.

Mr. COBB.—You may cross-examine.

Cross-examination.

(Mr. CHENEY.)

Q. There wasn't any building—was that store back in 1904 and 5, that building was built later?

A. I don't guess him; not very sure because was watching the month or summer if they get it built, but I believe he was building.

Q. You don't know—you are not sure about it, whether the building was built or not?

A. I can't tell, but should after building connect; they—it is not connected; therefore I don't know, but I believe it was built. That is all.

COURT.—That is all, Mr. Von Arx. That is the plaintiff's case, is it, Mr. Cobb?

Mr. COBB.—Yes, sir.

Mr. CHENEY.—Without repeating it, your

Honor, I will renew the motion asking the Court to direct a verdict for the defendant. [39]

COURT.—Very well, motion overruled. Call your first witness, Mr. Cheney.

Mr. CHENEY.—It is nearly twelve.

Whereupon Court adjourned, after the jury being duly admonished, until two o'clock this afternoon.

[Proceedings Had January 9, 1911, 2 P. M.]

Two o'clock P. M., January 9, 1911.

COURT.—Ready to proceed, gentlemen?

Mr. CHENEY.—Ready.

Mr. COBB.—Ready.

COURT.—Show that the jury is all present, Mr. Reporter. Proceed with the trial, gentlemen.

[Certain Offers in Evidence.]

Mr. CHENEY.—If it please the Court, defendant now offers in evidence the judgment and decree of this Court in cause No. 667-A, entitled J. M. Jenne vs. Edward Ehrlich, Alex Smallwood, and L. A. Slane.

* * *

COURT.—Any objection, Mr. Cobb?

Mr. CHENEY.—Just a moment, Mr. Cobb; I will find the judgment-roll.

Mr. COBB.—I presume you are offering it in the roll.

Mr. CHENEY.—Well, I haven't. My idea of the law is that if you offer a judgment of the Court and then the proceedings upon the judgment, is all that is necessary. I don't think it is necessary to offer the pleadings. I offer the judgment. It is here some place.

Mr. COBB.—Well, Mr. Cheney, in order that we may shorten up matters—do you offer that as a decree against Ehrlich alone or against Smallwood also?

Mr. CHENEY.—I offer the judgment for what it is worth. The Court will decide what it amounts to.
[40]

Mr. COBB.—I understand.

Mr. CHENEY.—Do you object to the judgment?

Mr. COBB.—We object to this as a judgment or decree in any way affecting Smallwood on the ground that the judgment-roll to which the judgment is attached shows that there was neither personal or constructive service upon Alex Smallwood and the judgment against him is void, though it is a personal judgment against Ehrlich because the Court will take judicial knowledge. I desire to call the Court's attention to a decree of this court entitled *Von Arx vs. J. M. Jenne et al.*, in which an injunction was applied for, and Judge Cushman held and ruled that this identical judgment as a judgment against Smallwood was void, and from that no appeal was taken, but that it was a mere personal judgment, not a decree at all, against Ehrlich.

Argument.

COURT.—I will overrule the objection with the understanding if I determine during the evening that it shouldn't be admitted that it will be subject to be stricken.

Argument.

Mr. COBB.—Note an exception.

COURT.—Yes, sir.

Mr. CHENEY.—

[Defendant's Exhibit "A"—Decree of Foreclosure.]

Deft's Ex. A. R. E. R.

*"In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 667-A—IN EQUITY.

J. M. JENNE,

Plaintiff,

vs.

EDWARD EHRLICH, ALEX SMALLWOOD, and
L. A. SLANE.

DECREE OF FORECLOSURE.

"This cause coming on regularly for hearing, upon motion of Z. R. Cheney, attorney for plaintiff; [41] the plaintiff appearing by his said attorney and the defendants in nowise appearing;

"It appearing to the Court that the summons and complaint in this cause were duly served upon the defendants and each of them and that more than thirty days has elapsed since such service and that the defendants Edward Ehrlich and Alex Smallwood and each of them have wholly failed to appear and that they and each of them are now in default for want of an answer or other appearance; and it further appearing that the defendant L. A. Slane has appeared and filed an answer to said complaint wherein he claims a lien upon a part of the property described in the bill of complaint herein, and the Court having heretofore made and filed its findings of fact and conclusions of law in the premises and now being fully advised in the premises

“It is ordered, adjudged and decreed: First: that the mortgage executed by the defendant Edward Ehrlich in favor of the plaintiff dated November 1st, 1902, for the sum of One thousand dollars with interest & attorneys’ fees, be and the same is hereby declared to be a first lien upon the two lots and the building thereon adjoining the Beach Store and Lodging House on the north located on the beach on Gastineaux Channel in the town of Douglas, Alaska, and that said mortgage be and the same is hereby declared to be a second lien upon the lot and building located thereon known as the Beach Store and Lodging House located on the beach on Gastineaux Channel in the town of Douglas, Alaska;

“Second; that the mortgage executed by the defendant [42] Edward Ehrlich in favor of the defendant L. A. Slane dated July 2d, 1902, for the sum of four hundred dollars with interest and attorneys’ fees, be and the same is hereby declared to be a first lien upon the lot and building thereon known as the Beach Store and Lodging House located on the beach of Gastineaux Channel in the town of Douglas, Alaska;

“Third; that the two mortgages above described be foreclosed by the sale of the property therein described; that the property therein described be advertised and sold at public auction by the United States Marshal for the District of Alaska, Division No. 1, according to the statutes in such cases made and provided; that the property described in the two mortgages be sold in separate parcels, that is to say, the lot and buildings thereon known as the Beach

Store and Lodging House and which is more particularly described in the said mortgage of the defendant L. A. Slane shall be first sold and the proceeds thereof, after paying the costs and expenses of said sale, shall be applied in payment of the mortgage of the defendant L. A. Slane and the surplus, if any there be, shall be applied in payment of the mortgage of the plaintiff, and the surplus, if any there be, after such payments, shall on demand be paid to the defendant Edward Ehrlich; the remaining two lots and the building thereon adjoining the above described Beach Store and Lodging House shall then be sold and the proceeds of such sale, after payment of all costs and expenses of sale shall be applied in payment of the mortgage of the plaintiff [43] herein, and the surplus, if any there be, after such payments shall be paid, on demand, to the defendant Edward Ehrlich;

“Fourth; that the defendants Edward Ehrlich and Alex Smallwood and each of them, and all other persons whomsoever having or claiming any interest in or lien upon any of the property conveyed by the mortgages herein mentioned or either of them, subsequent to making and filing of said mortgages are hereby forever barred and foreclosed of any right, title or interest in said property or any part thereof;

“It is further ordered, adjudged and decreed that the plaintiff do have and recover judgment against the defendant Edward Ehrlich for the sum of eight hundred fifty and no/100 dollars with interest thereon at the rate of ten per cent per annum from August 15th, 1906, amounting to \$1053.02, together

with the sum of fifty dollars as attorney fees for the foreclosure of said mortgage, amounting in all to the sum of Eleven hundred three and 02/100 (\$1103.02) Dollars, together with his costs and disbursements herein expended taxed at \$29.10 dollars;

“That the defendant L. A. Slane do have and recover judgment against the defendant Edward Ehrlich for the sum of three hundred sixty-nine and 85/100 dollars with interest thereon at the rate of twelve per cent per annum from December 12th, 1904, amounting to \$546.83, together with the sum of seventy-five dollars as attorney fees for the foreclosure [44] of said mortgage, amounting in all to the sum of Six hundred twenty-one & 83/100, together with his costs and disbursements herein expended taxed at —— dollars.

“Done in open court this 8th day of December, 1908.

“ROYAL A. GUNNISON,

“Judge.

“No. 667-A. In the District Court for Alaska, Division No. 1. at Juneau. J. M. Jenne, Plaintiff. vs. Edward Ehrlich, et al., Defendants. Findings of Fact, Conclusions of Law and Decree. Z. R. Cheney, Attorney for Plaintiff. Office, Juneau, Alaska, Delaney Building. Filed Dec. 8, 1908. C. C. Page, Clerk. By A. W. Fox, Deputy.”

Mr. CHENEY.—Now, I will offer the Marshal's deeds, which are set up in the answer, from D. A. Sutherland, United States Marshal, to Edward Ehrlich. Have you any objection?

Mr. COBB.—No; let them go in subject to the ob-

jections we make to the entire record and what the Court instructs. We waive the reading of them.

COURT.—All right.

Mr. CHENEY.—We don't waive the reading of them.

[Defendant's Exhibit "B"—U. S. Marshal's Deed.]

Von Arx vs. Boone, Deft's. Ex. B.—R. E. R.

"UNITED STATES MARSHAL'S DEED.

"This Indenture, made and entered into this 5th day of March, in the year 1910, between Daniel A. Sutherland, United States Marshal for the First Division, District of Alaska, by virtue of his office, of the first part, and Edward Ehrlich, of the town of Douglas, Division Number One, District of [45] Alaska, of the second part;

"Witneseth: That whereas, at the regular December, 1908, term of the District Court of the United States held at the town of Juneau, in and for said District and Division on the eighth day of December, in the year A. D. 1908, J. M. Jenne, plaintiff, and L. A. Slane, one of the defendants respectively recovered judgment against Edward Ehrlich, defendant in a certain plea for the following sums, to wit: eleven hundred three dollars and two cents (\$1103.02) and twenty-nine dollars and ten cents (\$29.10) costs of suit, and six hundred twenty-one dollars and eighty-three cents (\$621.83); and

"Whereas, on the 28th day of December, A. D. 1908, there issued out of said District Court an order of sale and execution in the said action for the collection of said judgment, which said order of sale and execution were directed to James M. Shoup, the

then United States Marshal in and for said District of Alaska, Division Number One, and that said order of sale and execution were executed by the said James M. Shoup, the then United States Marshal, by virtue of his office and according to the Statutes in said case made and provided on the first day of February, A. D. 1909, upon a certain tract or parcel of land hereinafter described, which said land was advertised for sale by the said United States Marshal according to law and afterwards, to wit: on the first day of February, 1909, in pursuance of said advertisement the said then United States Marshal exposed said land to public sale at the front door of the [46] Federal Courthouse, at the said town of Juneau, and George Myers bid therefor the sum of one hundred seventy-five and 00/100 dollars (\$175.00), which being the highest and best bid, the said land and premises were struck off and sold to him, the said George Meyers, which will more fully appear by reference to a certificate of purchase given to the said George Meyers by the said James M. Shoup, the then United States Marshal, bearing date the first day of February, 1909; and

“Whereas, on the 2d day of March, 1910, and within twelve months after the confirmation of said sale of said premises to the said George Meyers, came Edward Ehrlich, the judgment debtor in said cause entitled J. M. Jenne versus Edward Ehrlich, Alex Smallwood and L. A. Slane, being cause No. 667—A of the records of said District Court, and redeemed said property by paying to Daniel A. Sutherland, the United States Marshal, and party of the first

part herein, the sum of one hundred ninety-three dollars and twenty-six cents (\$193.26), said sum being the amount of the purchase price paid by the said George Meyers with interest at the rate of 8% per annum thereon from February 1st, 1909, the date of the sale, together with taxes paid by the said George Meyers thereon, after the purchase thereof by him at said Marshal's sale; and the said Edward Ehrlich thereupon received a certificate of redemption executed by the said Daniel A. Sutherland, United States Marshal, bearing date the second day of March, 1910, by virtue of which redemption and [47] certificate the said Edward Ehrlich and his assigns become entitled to a deed of said premises from the said United States Marshal according to law on this 5th day of March, 1910.

“Now, therefore, I, Daniel A. Sutherland, United States Marshal of said District and Division by virtue of my office and by force of the Statute in such case made and provided, for and in consideration of the sum of one hundred ninety-three and 23/100 dollars (\$193.23) in hand to me paid by the said Edward Ehrlich party of the second part, have granted, bargained and sold and by these present do grant, bargain, and sell unto the said Edward Ehrlich all the right, title, interest and claim, which the said defendant Edward Ehrlich and Alex Smallwood on the day of sale aforesaid, had in and to the following described tract or parcel of land, to wit: two lots and buildings thereon adjoining the Beach Store and Lodging House on the north which said lots and buildings are located on Douglas Island on the beach

of Gastineaux Channel, in the town of Douglas, District and Division aforesaid.

“To have and to hold the said tract or parcel of land together with the appurtenances thereunto belonging unto the said Edward Ehrlich and his heirs and assigns forever.

“In Witness Whereof, I have hereunto set my hand and seal this 5th day of March, in the year of our Lord A. D. one thousand nine hundred and ten.

“D. A. SUTHERLAND,

“United States Marshal for the District of Alaska,
Division No. One.

“United States of America,
District of Alaska,—ss. [48]
Division No. One.

“I, Henry Shattuck, Clerk of the District Court of the United States for the District of Alaska, Division No. One, do hereby certify that Daniel A. Sutherland, United States Marshal for the said District of Alaska, Division Number One, who is known to me to be the person named in and who executed the foregoing deed of conveyance, this day personally appeared before me and acknowledged that he executed the same as United States Marshal for the uses and purposes therein set forth.

“In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Juneau, in said District and Division

this 5th day of March, in the year of our Lord, A. D. 1910.

“H. SHATTUCK,

“Clerk.

“Filed for record at 3 P. M., March 8th, 1910.

“H. H. FOLSOM,

“Recorder.

“I hereby certify that the foregoing is a full, true and correct copy of the above instrument as recorded in the office of the Recorder of Juneau Recording District, District of Alaska, Division Number One, in Book 22 of Deeds, at pages 351 and 352 thereof.

“Witness my hand and official seal this 9th day of Jan. 1911.

“[Seal]

G. C. WINN,

“Recorder.”

Mr. CHENEY.—The other deed is exactly the same as this, your Honor, except it is to the other piece of property. So won't read it. Will ask to introduce both deeds. [49]

COURT.—May be admitted.

[**Defendant's Exhibit “C”—U. S. Marshal's Deed.**]

Von Arx vs. Boone Deft. Ex. C.—R. E. R.

“UNITED STATES MARSHAL'S DEED.

“This Indenture, made and entered into this 5th day of March, in the year of our Lord, 1910, between Daniel A. Sutherland, United States Marshal for the District of Alaska, by virtue of his office, of the first part, and Edward Ehrlich of the town of Douglas, District of Alaska, Division No. One, of the second part;

“Witnesseth, that whereas, at the regular Decem-

ber, 1908, term of the District Court held at the town of Juneau in and for said District and Division on the 8th day of December, in the year A. D. 1908, J. M. Jenne, plaintiff, and L. A. Slane, one of the defendants in the cause entitled J. M. Jenne, plaintiff, vs. Edward Ehrlich, Alex Smallwood and L. A. Slane, defendants No. 667-A, recovered a judgment for the following amounts respectively, to wit one thousand one hundred and three 02/100 (\$1103.02) dollars with twenty-nine 10/100 (\$29.10) dollars costs of suit and six hundred twenty-one 83/100 (\$621.83) dollars, against the said Edward Ehrlich, defendant therein; and

“Whereas, on the 28th day of December, A. D. 1908, an order of sale and an execution issued out of said District Court for the collection of said judgment, which said order of sale and execution was directed to said James M. Shoup, the then United States Marshal as aforesaid; and

“Whereas, said order of sale and execution were [50] executed by the said United States Marshal by virtue of his office, and according to the Statute in such case made and provided on the first day of February, 1909, upon a certain tract or parcel of land hereinafter described, which said land was advertised for sale by said United States Marshal according to law and afterward, to wit, on the said 1st day of February, 1909, in pursuance of said advertisement, the said United States Marshal exposed said land to public sale at the front door of the Federal Courthouse at Juneau, in said District and Division and L. A. Slane bid the sum of three hundred

(\$300.00) dollars therefor, which being the highest and best bid the said land and premises were struck off and sold to him, the said L. A. Slane, which will more fully appear by reference to a certificate of purchase, given to said L. A. Slane by the said James M. Shoup, the *ten* United States Marshal, bearing date the first day of February, 1909; and

“Whereas, the said certificate of purchase was on the 4th day of February, 1909, duly assigned by the said L. A. Slane to A. J. Boone of the town of Douglas, District and Division aforesaid; and

“Whereas, on the 2d day of March, 1910, and within twelve months after the confirmation of said sale came Edward Ehrlich, the judgment debtor in the aforesaid cause, No. 667-A, and redeemed said property by paying to Daniel A. Sutherland, United States Marshal and the party of the first part herem the sum of three hundred twenty-six $13/100$ (\$326- $13/100$) dollars, said sum being the amount of the purchase [51] price paid by the said L. A. Slane with interest at the rate of eight per cent per annum thereon from February 1st, 1909, the date of the sale, and the said Edward Ehrlich thereupon received a certificate of redemption executed by the said Daniel A. Sutherland, United States Marshal, bearing date the second day of March, 1910, by virtue of which redemption and certificate the said Edward Ehrlich and his assigns became entitled to a deed for said premises from the said United States Marshal according to law on this 5th day of March, 1910;

“Now, therefore, I, Daniel A. Sutherland, United States Marshal of said District and Division by virtue

of my office and by force of the Statute in such case made and provided, for and in consideration of the sum of three hundred twenty-six 13/100 (\$326.13) dollars to me in hand paid by the said Edward Ehrlich have granted, bargained and sold and by these presents do grant, bargain and sell unto the said Edward Ehrlich all of the right, title and claim which the said Edward Ehrlich and Alex Smallwood, defendants, on the day of said sale; had in and to the following-described premises, more particularly described as follows, to wit:

“Being the lot and building located thereon, known as the Beach Store and Lodging House located on Douglas Island on the beach of Gastineaux Channel in the town of Douglas Island, District and Division aforesaid.

“To have and to hold the said tract or parcel of land and premises, together with the appurtenances [52] thereunto belonging unto the said Edward Ehrlich and his heirs and assigns forever.

“In Witness Whereof, I have hereunto set my hand and seal, this 5th day of March, in the year of our Lord, one thousand nine hundred and ten.

“D. A. SUTHERLAND,

“United States Marshal for the District of Alaska,
Division No. One.

“United States of America,
District of Alaska,
Division No. One,—ss.

“I, Henry Shattuck, Clerk of the District Court of the United States for the District of Alaska, Division No. One, do hereby certify that Daniel A. Suther-

land, United States Marshal for the said District of Alaska, Division No. One, who is known to me to be the person named in and who executed the foregoing deed of conveyance, this day personally appeared before me and acknowledged that he executed the same as United States Marshal for the uses and purposes therein set forth.

“In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Juneau, in said District, this 5th day of March, in the year of our Lord, A. D. 1910.

“[Seal] H. SHATTUCK, Clerk.

“Filed for record at 3 P. M., March 8th, 1910.

“H. H. FOLSOM, Recorder.

“I hereby certify that the above and foregoing is a full, true and correct copy of said instrument as recorded in the office of the Recorder of Juneau Recording District, District of Alaska, Division Number One, in book 22 of Deeds, on pages 348 and 349.
[53]

“Witness my hand and official seal this 9th day of Jan., 1911.

“[Seal] G. C. WINN, Recorder.”

Mr. CHENEY.—Mr. Cobb, will you admit that this is the same property described in the complaint?

Mr. COBB.—Yes.

Mr. CHENEY.—The descriptions may not be the same. Let the record show that the plaintiff admits that is the same property in these deeds as described in the plaintiff's complaint. I offer those in evidence.

COURT.—You may mark those.

Mr. CHENEY.—Defendant now offers in evidence the execution in case 667-A, entitled J. M. Jenne against L. A. Slane; execution upon the judgment in favor of J. M. Jenne and against the same parties, together with the return of the Marshal and the proof of publication attached to it.

COURT.—Any objection, Mr. Cobb?

Mr. COBB.—That is the second execution?

Mr. CHENEY.—Yes.

Mr. COBB.—We will make our objection to the entire record when it is in.

COURT.—Very well, it may be admitted with that understanding.

Mr. CHENEY:

[Defendant's Exhibit "D"—Execution.]

Von ARX vs. Boone. Deft's Ex. D.—RER.

*"In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 667-A.

J. M. JENNE,

Plaintiff,

vs.

EDWARD EHRLICH, ALEX SMALLWOOD,
and L. A. SLANE,

Defendants.

EXECUTION.

[54]

"To any Marshal of the District of Alaska or to his Deputy, Greeting:

"Whereas, on December 8, 1908, by consideration of the above-entitled Court, J. M. Jenne, plaintiff, re-

covered judgment against Edward Ehrlich, defendant, for the sum of one thousand three and 2/100 dollars (\$1003.02) and the further sum of twenty-nine and 10/100 dollars (\$29.10) costs and disbursements, which judgment was enrolled and docketed in the office of the Clerk of said court on said date.

“And whereas on February 1, 1909, there was paid and credited on said judgment the sum of one hundred sixty-six and 25/100 dollars (\$166.25), leaving a balance due and unpaid on said judgment on February 1, 1909, of nine hundred seventy-nine and 7/100 dollars (\$979.07).

“Now therefore you are hereby commanded that out of the personal property of the said defendant in your district, or if sufficient cannot be found, then out of the real property of the said defendant in your district, on or after December 8, 1908, you satisfy the sum of nine hundred seventy-nine and 7/100 dollars (\$979.07) now due on said judgment with interest thereon from February 1, 1909, at the rate of eight per cent per annum, amounting at this date to the sum of one thousand sixty-three and 92/100 dollars (\$1063.92) and also the costs of and upon this writ and the accruing costs; and that you make due returns of the same and of this writ.

“Witness the Honorable E. E. Cushman, Judge of the District Court for the District of Alaska, Division Number One and the seal of said Court affixed at Juneau in said district this 8th day of March, [55] 1910.

“[Seal]

H. SHATTUCK,

“Clerk.

“PROOF OF PUBLICATION.

“United States of America,
District of Alaska,—ss.

“E. D. Beattie, being first duly sworn, deposes and says that he is the foreman of the ‘Daily Alaska Dispatch,’ a newspaper published at Juneau, in the District of Alaska by the Dispatch Publishing Co.; that the notice of Marshal’s sale, a copy of which is hereto attached and made a part of this affidavit, was first published in said newspaper, in its issue dated the 11th day of March, 1910, and was published in each weekly issue of said newspaper for 5 consecutive weeks thereafter, the full period of 30 days, the last publication thereof being in the issue dated the 10th day of April, 1910.

“E. D. BEATTIE.

“Subscribed and sworn to before me this third day of May, A. D. 1910.

“[Seal]

Z. R. CHENEY,

“Notary Public for Alaska.

“NOTICE OF MARSHAL’S SALE.

“Notice is hereby given that under and by virtue of a Writ of Execution issued out of the District Court for the District of Alaska, Division No. 1, at Juneau, upon a judgment rendered and entered December eighth, 1908, in a cause No. 667–A, wherein J. M. Jenne is plaintiff and Edward Ehrlich, Alex Smallwood and L. A. Slane are defendants, in favor of the plaintiff and against Edward Ehrlich, defendant, for the sum of eleven hundred thirty-two and [56] 12/100 (\$1132.12) dollars damages and costs

and disbursements, which said judgment was on December eighth, 1908, duly docketed in the above named court and cause, upon which judgment there is now due the sum of \$1063.92, I, Daniel A. Sutherland, United States Marshal, have levied upon the following described real property belonging to the defendant, Edward Ehrlich, located in Douglas, in the District of Alaska, described as follows, to wit:

“That certain lot and building thereon known as the Beach Store and Lodging House, also two certain lots adjoining said first mentioned lot on the north together with the frame building located thereon, all of said property lying and being on the beach about five hundred feet north of the old Bears Nest Boarding House, in the town of Douglas, Alaska; and that on Saturday, the 16th day of April, 1910, at the front door of the United States Courthouse in Juneau, Alaska, at the hour of eleven o'clock in the forenoon of said day, I will sell all the right, title and interest of said defendant, Edward Ehrlich, in and to said above described property, at public vendue, to the highest and best bidder for cash. The said property will be sold in separate parcels, that is to say, the lot and building known as the Beach Store and Lodging House will be first sold and if the proceeds therefrom are not sufficient to satisfy the judgment and costs of sale, then the remaining property will be sold and the proceeds thereof applied

in satisfaction of said judgment and costs. [57]

“Dated at Juneau, Alaska, March 9, 1910.

“DANIEL A. SUTHERLAND,

“United States Marshal.

“By W. D. McMillan,

“Office Deputy.

“First Pub. Mar. 11—5t.

“United States of America,

District of Alaska,

Division No. One,—ss.

“I hereby certify that I received the within and hereto attached writ of execution on the 8th day of March, 1910, and that thereafter on the 9th day of Mar., 1910, I did levy upon the following described real property belonging to the defendant Edward Ehrlich located in the town of Douglas, District of Alaska, Division No. One, to wit: that certain lot and building thereon known as the Beach Store and Lodging House; also two certain lots adjoining said first mentioned lot on the north together with the frame building located thereon; all of said property lying and being on the beach about five hundred feet north of the old Bears' Nest boarding house, in the town of Douglas, aforesaid; and on the said 9th day of March, 1910, I did publish and post notice of sale of said property, as required by law; said notice of sale was published for four weeks consecutively (five publications) in the Alaska Daily Dispatch, a newspaper of general circulation published in the town of Juneau, Alaska, a copy of which said notice is hereto attached. Said sale of said property was advertised to take place on the 16th day of April,

1910. Thereafter on the 16th day of April upon a restraining order issued by the District Court in cause No. 781A, I postponed said sale until Apr. 23, 1910, as required [58] by law, and on Apr. 23, for like cause I postponed said sale in like manner until Apr. 27, 1910, and on Apr. 27th for like cause and in like manner I postponed said sale until Apr. 30th, 1910, and on April 30th, 1910, I delivered the within execution to my successor in office, H. L. Faulkner, U. S. Marshal.

“Dated at Juneau, Alaska, Apr. 30, 1910.

“D. A. SUTHERLAND,

“U. S. Marshal.

“By Hector McLean,

“Office Deputy.

“United States of America,
District of Alaska,
Division No. One,—ss.

“I hereby certify that I received the within and hereto attached writ of execution on the 30th day of April, 1910, from my predecessor in office, Daniel A. Sutherland, U. S. Marshal for the District of Alaska, Division No. One, and that upon said day I postponed the within mentioned sale of the within described property until 2 o'clock P. M. on the 2nd day of May, 1910; and thereafter on the 2nd day of May, 1910, at 2 o'clock P. M., at the front door of the United States courthouse at Juneau, Alaska, I offered for sale at public auction the certain lot and building known as the Beach store and lodging house, described herein; there being no bids, I then offered for sale the two certain lots adjoining the first mentioned lot and

lodging house, described herein; there being no bids, I then offered for sale both pieces of property above mentioned, together; and sold the said property to A. J. Boone of Douglas, Alaska, for the sum of \$825, that being [59] the highest and best sum bid for said property. I therefore return the within execution satisfied in full.

“Dated at Juneau, Alaska, May 3, 1910.

“H. L. FAULKNER,

“U. S. Marshal.

“By Hector McLean,

“Office Deputy.

“MARSHAL’S FEES:

Service of writ.....	\$ 3.00
5% com. on \$500.....	25.00
3% com. on \$325.....	9.75

Total.....\$37.75

“No. 667–A. In the District Court for the District of Alaska, Div. No. 1, at Juneau. J. M. Jenne, Plaintiff, vs. Edward Ehrlich, Alex Smallwood & L. A. Slane, Defendants. Execution in favor of J. M. Jenne.

Amt.	979.07
Interest.....	84.85

Total.....1063.92

“THIS WRIT FILED MAY 3, 1910. H. SHATTUCK, CLERK. BY H. MALONE, DEPUTY, Z. R. CHENEY, ATTORNEY FOR PLFT., JUNEAU, ALASKA. U. S. MARSHAL’S OFFICE, JUNEAU, ALASKA. RECEIVED FOR

SERVICE MAR. 8, 1910. D. A. SUTHERLAND, U. S. MARSHAL, BY H. L. FAULKNER, CHIEF OFFICE DEPUTY, MARSHAL'S DKT. NO. 2157."

I will waive the reading of the notice of sale if Mr. Cobb will waive it.

COURT.—You offer the return in evidence too?

Mr. CHENEY.—Yes.

Mr. COBB.—Same objection as to the rest.

COURT.—Very well.

Mr. CHENEY.—Now, will you concede that this writ shows—that the property described in this return and execution is the same property described in the complaint?

Mr. COBB.—Why, I don't know whether that is the same property. He must of course intend to convey the same property. [60]

Mr. CHENEY.—We offer it in evidence. The description may be a little different—the beach store and lodging-house.

Mr. COBB.—Oh, yes; that is doubtless the same property.

Mr. CHENEY.—All right.

COURT.—It may be received and marked.

Mr. CHENEY.—I now offer the order of the Honorable E. E. Cushman, Judge of this Court, confirming the sale in the case of 667-A, J. M. Jenne vs. Edward Ehrlich, Alex Smallwood and L. A. Slane. Any objection to the order?

Mr. COBB.—Let's see the order. It may go in subject to the same objection.

COURT.—Very well, may be admitted, going to the whole record.

Mr. CHENEY:

[**Defendant's Exhibit "E"—Order Confirming Sale.**]

Von Arx vs. Boone. Deft's Ex. E. RER.

*"In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

J. M. JENNE,

Plaintiff,

vs.

EDWARD EHRLICH, ALEX SMALLWOOD and
L. A. SLANE,

Defendants.

"ORDER CONFIRMING SALE UNDER EXECUTION.

"This matter came on for hearing upon motion of plaintiff for an Order confirming the sale of certain real property at Douglas, Alaska, belonging to Edward Ehrlich, one of the above-named defendants, which said property was sold by the United States Marshal for the District of Alaska, Division No. 1 at Juneau on May 2, 1910. The plaintiff appeared by Z. R. Cheney, his attorney, and one Victor von Arx appearing by his attorney, J. G. Heid, and filed written objections to [61] the confirmation of said sale setting forth among other things that the property described was the property of one Alex Smallwood, one of the above-named defendants, and that this Court had no jurisdiction over the person of said Smallwood; said objections were argued by counsel

and after due consideration, it is ordered that the same be and they are each and all overruled.

“And it appearing to the Court from the return of the Marshal that by virtue of an execution duly and regularly issued out of this Court March 9, 1910, he levied upon all the right, title and interest of Edward Ehrlich in and to that certain real property located at Douglas, Alaska, described as the lot and building known as the Beach Store and Lodging House and the two lots and building thereon adjoining said Beach Store and Lodging House on the north. That thereafter the said Marshal did on May 2, 1910, after duly advertising said sale as required by law, sell all the right, title and interest in and to said property belonging to the said defendant, Edward Ehrlich, at public sale to one A. J. Boone, for the sum of eight hundred, twenty-five dollars (\$825), lawful money of the United States, the said Boone being the highest and best bidder at said sale and said sum being the highest sum bid for said property.

“It further appearing to the Court that said sale was in all things regularly made and fairly conducted,

“Now, therefore, it is ordered that the said sale of the above described property be and the same hereby [62] is in all things confirmed:

“Done in open Court this 11th day of May, 1910.

“EDWARD E. CUSHMAN,

“Judge of the District Court for the District of Alaska, Division No. 1.

“No. 667-A. In the District Court for Alaska, Division No. 1, at Juneau. J. M. Jenne, Plaintiff vs.

Edward Ehrlich, Alex Smallwood & L. A. Slane, Defendants. Order Confirming Sale. Filed May 11, 1910. H. Shattuck, Clerk. By H. Malone, Deputy. Z. R. Cheney, Attorney for Plft. Office: Juneau, Alaska, Lewis Block.”

Mr. CHENEY.—I now offer the certificate of purchase which defendant A. J. Boone obtained from the Marshal at the sale on the execution.

Mr. COBB.—It may go in subject to the same objection—the entire objection. We will waive the reading of it, Mr. Cheney, unless you insist upon it.

Mr. CHENEY.—I won’t insist upon reading it. I offer also the endorsement upon the back of the certificate of purchase and ask that that be copied into the record as part of the instrument, showing where it was recorded, etc.

COURT.—Very well.

Mr. COBB.—The whole instrument?

Mr. CHENEY.—I believe that is all the record evidence I have now, your Honor. There are so many of these papers I might have overlooked something. I think I will introduce or offer. I will call Mr. Boone.

[Defendant’s Exhibit “F” — Certificate of Purchase.]

Von Arx vs. Boone. Deft’s Ex. F. RER.

“CERTIFICATE OF PURCHASE.

“United States of America,
District of Alaska,—ss

“I, H. L. Faulkner, United States Marshal of the [63] said District of Alaska, Division No. 1, do hereby certify that by virtue of a certain writ of

Fieri Facias (or execution) issued out of and under the seal of the United States District Court for the District of Alaska, Division No. 1, on the 8th day of March, A. D., 1910, in cause No. 667-A, in favor of J. M. Jenne, Plaintiff, and against Edward Ehrlich, Defendant, directed and delivered to Daniel A. Sutherland, the then United States Marshal for the District of Alaska, Division No. 1, and to his deputies, he, the said Daniel A. Sutherland, as such United States Marshal for said District and Division, did on the ninth day of March, A. D. 1910, levy upon all the right, title, interest or estate had owned or held by the said Edward Ehrlich, defendant in the above-entitled cause, on the 8th day of December, 1908, or at any time thereafter of, in and to the following described real estate located, lying and being at Douglas in said Division and District of Alaska, to wit: That certain lot, piece, or parcel of land known as the Beach Store and Lodging House and the two lots adjoining same on the north together with all the buildings and improvements thereon, said property being located on the beach about five hundred feet north of the old Bears Nest Boarding House in the town of Douglas, Alaska. And that thereafter, I, H. L. Faulkner, as United States Marshal for the District of Alaska, Division No. 1, did, on the second day of May, A. D. 1910, at the front door of the United States courthouse at the hour of two o'clock P. M., of [64] said day and in the manner provided by law, and after duly advertising said property according to the statutes in such cases made and provided, sell at public sale to A. J. Boone of Douglas, Alaska, for the

sum of eight hundred twenty-five dollars, \$825.00, lawful money of the United States, the said A. J. Boone being the highest and best bidder and that being the highest sum bid for the same at said sale, all the right, title and interest of said defendant, Edward Ehrlich of which he was seized and possessed on the ninth day of March, 1910, the date of said levy, or at any time afterwards, of in and to that certain lot, piece or parcel of land known as the Beach Store and Lodging House and the two lots adjoining same on the north, said property being located on the beach about five hundred feet north of the old Bears Nest Boarding house in the town of Douglas, Alaska, together with the hereditaments and appurtenances thereunto belonging.

“And I do further certify that the purchase money so bidden at said sale has been paid to me and that said sale will become absolute and the said A. J. Boone or his assigns will be entitled to a deed of conveyance of the said land within twelve months from the date of confirmation of said sale unless the same shall be sooner redeemed according to the statute in such case made and provided.

“Given under my hand, this second day of May, A. D. 1910.

“H. L. FAULKNER.

“United States Marshal for the District of Alaska,
Division No. 1. [65]

“\$1.80. No. ——. In the District Court for Alaska, Division No. 1, at Juneau. ———, Plaintiff, vs. ———. Defendant. District of Alaska, Juneau: ss. The within instrument was

(Testimony of A. J. Boone.)

filed for record at 10 o'clock A. M., May 4, 1910, and duly recorded in book 22 of Deeds on page 369 of the records of said district. H. H. Folsom, District Recorder. Z. R. Cheney, Attorney for ————. Office: Juneau, Alaska, Lewis Block."

COURT.—Mr. Boone.

Mr. CHENEY.—Mr. Boone, will you take the stand for just a question?

[Testimony of A. J. Boone, the Defendant, in His Own Behalf.]

Whereupon A. J. BOONE, defendant in this action, was called and duly sworn, and testified as follows on his own behalf.

Direct Examination.

(Mr. CHENEY.)

Q. You live in Douglas, Mr. Boone?

A. Yes, sir.

Q. You are acquainted with the property known as the beach store and lodging-house and the property on the north, next on the north of it?

A. Yes, sir; I am acquainted with it.

Q. How long have you been in possession of that property, Mr. Boone?

A. Oh; I have been in possession of that property for seventeen or eighteen months now.

Q. You are in possession of the property now, are you? A. Yes, sir.

Q. You are the A. J. Boone who purchased that property at the Marshal's sale and received this certificate of purchase, are you—that is the one you gave me? A. Yes, sir; that is it. [66]

(Testimony of A. J. Boone.)

Q. That is the certificate of sale you received from the Marshal for the property?

A. Received from the Marshal.

Q. You have paid the \$825.00 mentioned therein?

Mr. COBB.—We object to that, it is wholly incompetent, irrelevant and immaterial.

A. Yes; I paid the \$825.00.

Mr. CHENEY.—That is all. I don't insist on that. I suppose the papers show.

Mr. COBB.—Certainly.

Mr. CHENEY.—That is all.

Mr. COBB.—No cross-examination.

COURT.—Anything further, Mr. Cheney?

Mr. CHENEY.—No; I believe that is all the testimony, your Honor; that is all.

[Evidence in Rebuttal.]

Mr. COBB.—In rebuttal we will offer a portion of the record in cause No. 667-A that has been omitted for the purpose of showing the invalidity of the deed so far as the defendant Smallwood is concerned in this case.

Mr. CHENEY.—We will object to that for this reason—it is picking out a part of the files in 781-A.

Mr. COBB.—667-A?

Mr. CHENEY.—667.

COURT.—That is the foreclosure?

Mr. CHENEY.—I object to it for this reason—that the plaintiff in this case, Victor Von Arx—neither the plaintiff, Victor Von Arx—nor the de-

fendant, A. J. Boone, were parties to that cause No. 667-A.

Argument.

COURT.—I will permit you to introduce anything that will show the validity of any attack that may be made against you? What is the affidavit you offer? [67]

Mr. COBB.—This is an affidavit for publication of summons in the case of J. M. Jenne, Plaintiff, versus Edward Ehrlich, Alex Smallwood and L. A. Slane, Defendants.

[Plaintiff's Exhibit No. 5—Affidavit in Jenne vs. Ehrlich.]

Von Arx vs. Boone. Plff's. Ex. 5. RER.

*“In the District Court for the District of Alaska
Division No. 1, at Juneau.*

No. 667.

J. M. JENNE,

Plaintiff,

EDWARD EHRLICH, ALEX SMALLWOOD and
L. A. SLANE,

Defendants.

**“AFFIDAVIT FOR PUBLICATION OF SUM-
MONS.**

“United States of America,
District of Alaska,—ss.

“Z. R. Cheney, being first duly sworn, on his oath says: I am the attorney for the plaintiff in the above-entitled action; said action was commenced on Feb. 12th, 1908, by the filing of a complaint and

a summons was thereupon duly issued by the Clerk and placed in the hands of the United States Marshal for Division No. 1, which said summons the Marshal retained in his hands the full period of forty days as commanded in said writ and afterwards duly returned the same with his certificate thereon showing that Alex Smallwood, one of the defendants therein named, after diligent search and inquiry could not be found in the District and Division No. 1, which fact more fully appears by the return of said Marshal dated March 23rd, 1908, and on file herein.

“Affiant further says that a cause of action exists against said Alex Smallwood and that he is a proper party defendant thereto; that said action relates to real estate located in Douglas, Alaska; that the purpose of said action is to foreclose a mortgage [68] upon real estate which said Smallwood claims by deed of purchase from the defendant Edward Ehrlich. Affiant further says that he is informed and believes that said Alex Smallwood resides in the province of British Columbia and that his present address is Riverside P. O., Log Valley, Sask.. B. C., and that he has not resided in or been a resident of the District of Alaska for more than one year last past and that he is not within the said District. Wherefore affiant prays that an Order be made for publication of the summons in this cause as provided by law.

“Z. R. CHENEY.

“Subscribed and sworn to before me this 23rd day of April, 1908.

“[Seal]

H. H. FOLSOM,

“U. S. Commissioner for Alaska at Juneau.

“No. 667. In the District Court for the District of Alaska, Division No. 1. J. M. Jenne, Plaintiff, vs. Edward Ehrlich, Alex Smallwood and L. A. Slane, Defendants. Affidavit for Publication of Summons. Filed Apr. 23, 1903. C. C. Page, Clerk, by A. W. Fox, Deputy. Z. R. Cheney, Atty. for Plaintiff. Juneau, Alaska. Plff's Ex. B. Case #781-A.”

COURT.—It may be admitted. Want to offer now the order for publication?

Mr. COBB.—Yes, sir; I next offer in evidence the order for publication of summons in the same cause No. 667-A, which reads as follows,—

COURT.—Any objection?

Mr. CHENEY.—I object to it on the ground that it is immaterial after the judgment has been once offered.

COURT.—Objection overruled. It may be admitted [69] and those matters will be considered the same as any other you offered, Mr. Cheney.

Mr. COBB:

**[Plaintiff's Exhibit No. 6—Order for Publication
of Summons in Jenne vs. Ehrlich.]**

Von Arx vs. Boone, Plff. Ex. 6. RER.

*“In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 667.

J. M. JENNE,

Plaintiff,

vs.

EDWARD EHRLICH, ALEX SMALLWOOD,
and L. A. SLANE,

Defendants.

“ORDER FOR PUBLICATION OF SUMMONS.

“Upon reading and filing the affidavit of Z. R. Cheney, Esq., attorney for the plaintiff in the above entitled cause, showing that the said action is one for the foreclosure of a mortgage upon certain real estate located in Douglas, Alaska, and within the jurisdiction of this Court; that said Smallwood is a proper party defendant to said action; that said Smallwood, after diligent search and inquiry cannot be found in the District of Alaska, but that he is a resident of and now resides in the Province of British Columbia and praying for an order for the publication of the summons herein as provided by law,

“It is ordered that said summons be published in the Transcript, a weekly newspaper printed and published in Juneau, Alaska, for the period of six weeks once in each week and that plaintiff's attorney mail

a copy of said summons and complaint in said cause to the defendant, Alex Smallwood, at his place of residence in British Columbia, forthwith.

“Done in open court at Juneau, Alaska, April 23, 1908.

“ROYAL A. GUNNISON,

“Judge.

“No. 667. In the District Court for the District of Alaska, Division No. 1. J. M. Jenne, Plaintiff, vs. [70] Edward Ehrlich, Alex Smallwood and L. A. Slane, Defendants. Order for Publication of Summons. Filed Apr. 23, 1908, C. C. Page. By A. W. Fox. Z. R. Cheney, Attorney for Plaintiff, Juneau, Alaska.”

Now, I next offer the summons for publication and the return thereon.

COURT.—Any objection, Mr. Cheney?

Mr. CHENEY.—Same objection—it is immaterial is all.

COURT.—It may be admitted.

Mr. COBB:

[Plaintiff's Exhibit No. 7—Summons in Jenne vs.
Ehrlich.]

Von Arx vs. Boone. Plff. Ex. 7 RER.

*“In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 667.

J. M. JENNE,

Plaintiff,

vs.

EDWARD EHRLICH, ALEX SMALLWOOD,
and L. A. SLANE,

Defendants.

“SUMMONS FOR PUBLICATION.

“To Alex Smallwood, One of the Above-named Defendants, Greeting:

“You are hereby commanded to be and appear in the above-entitled court holden at Juneau in said Division and District within thirty days after the completion of the period of publication of this summons, there to answer the complaint filed against you in which complaint and action J. M. Jenne is plaintiff and Edward Ehrlich, L. A. Slane and yourself are defendants. Said action is for the foreclosure of a certain mortgage for the sum of One thousand dollars and interest which said mortgage was made and executed by Edward Ehrlich to the plaintiff in 1902 and conveys all of the interest of said Ehrlich in three lots located on the beach on Douglas Island, Alaska, in the town of Douglas, together with two buildings thereon [71] known as the Beach Store and Lodg-

ing House and the house adjoining same on the north; and if you fail to so appear and answer for want thereof the plaintiff will apply to the Court for the relief demanded in said complaint, to wit: a decree foreclosing said mortgage and for such other and further relief as the plaintiff may be entitled to as well as judgment for costs and disbursements of said suit. The Order for publication of this summons is dated April 23rd, 1908.

“In Witness Whereof I have hereto set my hand and affixed the seal of the above court this 25th day of April, 1908.

“[Seal]

C. C. PAGE,

“Clerk.

“By A. W. Fox,

“Deputy.

“Z. R. CHENEY, Attorney for Plaintiff.

“First pub. May 2. Last June 13.

“PROOF OF PUBLICATION.

“United States of America,
District of Alaska,—ss.

“Will C. Ullrich, being first duly sworn, deposes and says that he is the publisher of the Alaska Weekly Transcript, a newspaper published at Juneau, in the District of Alaska; that the notice of summons for publication, a copy of which is hereto attached and made a part of this affidavit, was first published in said newspaper, in its issue dated the second day of May, 1908, and was published in each weekly issue of said newspaper for 7 consecutive weeks thereafter, the full period of — days, the last publication thereof being in the issue dated the

[Plaintiff's Exhibit No. 7—Summons in Jenne vs.
Ehrlich.]

Von Arx vs. Boone. Plff. Ex. 7 RER.

*“In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 667.

J. M. JENNE,

Plaintiff,

vs.

EDWARD EHRLICH, ALEX SMALLWOOD,
and L. A. SLANE,

Defendants.

“SUMMONS FOR PUBLICATION.

“To Alex Smallwood, One of the Above-named Defendants, Greeting:

“You are hereby commanded to be and appear in the above-entitled court holden at Juneau in said Division and District within thirty days after the completion of the period of publication of this summons, there to answer the complaint filed against you in which complaint and action J. M. Jenne is plaintiff and Edward Ehrlich, L. A. Slane and yourself are defendants. Said action is for the foreclosure of a certain mortgage for the sum of One thousand dollars and interest which said mortgage was made and executed by Edward Ehrlich to the plaintiff in 1902 and conveys all of the interest of said Ehrlich in three lots located on the beach on Douglas Island, Alaska, in the town of Douglas, together with two buildings thereon [71] known as the Beach Store and Lodg-

ing House and the house adjoining same on the north; and if you fail to so appear and answer for want thereof the plaintiff will apply to the Court for the relief demanded in said complaint, to wit: a decree foreclosing said mortgage and for such other and further relief as the plaintiff may be entitled to as well as judgment for costs and disbursements of said suit. The Order for publication of this summons is dated April 23rd, 1908.

“In Witness Whereof I have hereto set my hand and affixed the seal of the above court this 25th day of April, 1908.

“[Seal]

C. C. PAGE,

“Clerk.

“By A. W. Fox,

“Deputy.

“Z. R. CHENEY, Attorney for Plaintiff.

“First pub. May 2. Last June 13.

“PROOF OF PUBLICATION.

“United States of America,
District of Alaska,—ss.

“Will C. Ullrich, being first duly sworn, deposes and says that he is the publisher of the Alaska Weekly Transcript, a newspaper published at Juneau, in the District of Alaska; that the notice of summons for publication, a copy of which is hereto attached and made a part of this affidavit, was first published in said newspaper, in its issue dated the second day of May, 1908, and was published in each weekly issue of said newspaper for 7 consecutive weeks thereafter, the full period of ——— days, the last publication thereof being in the issue dated the

13th day of June, 1908.

“WILL C. ULLRICH. [72]

“Subscribed and sworn to before me this 1st day of July, A. D. 1908.

“[Notarial Seal] GUY McNAUGHTON,
“Notary Public for Alaska.

“SUMMONS FOR PUBLICATION.

“No. 667.

*“In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

J. M. JENNE,

Plaintiff,

vs.

EDWARD EHRLICH, ALEX SMALLWOOD
and L. A. SLANE,

Defendants.

“To Alex Smallwood, One of the Above-named Defendants, Greeting:

“You are hereby commanded to be and appear in the above-entitled court holden at Juneau in said Division and District within thirty days after the completion of the period of publication of this summons, there to answer the complaint filed against you in which complaint and action J. M. Jenne is plaintiff and Edward Ehrlich, L. A. Slane and yourself are defendants. Said action is for the foreclosure of a certain mortgage for the sum of one thousand dollars and interest which said mortgage was made and executed by Edward Ehrlich to the plaintiff in 1902 and conveys all the interest of said Ehrlich in three lots located on the beach on Douglas Island, Alaska,

in the town of Douglas, together with two buildings thereon known as the Beach Store and Lodging House and the house adjoining same on the north; And if you fail to so appear and answer for want thereof the plaintiff will apply to the Court for the relief demanded in said complaint, to wit: a decree foreclosing said mortgage and for such other and further relief as the plaintiff may be entitled to [73] as well as judgment for costs and disbursements of said suit. The order for publication of this summons is dated April 23, 1908.

“In Witness Whereof I have hereto set my hand and affixed the seal of the above Court this 25th day of April, 1908.

“[Seal]

C. C. PAGE,

“Clerk.

“By A. W. Fox,

“Deputy.

“Z. R. CHENEY, Attorney for Plaintiff,
Juneau, Alaska.

“First Pub. May 2, 1908. Last Pub. June 13, 1908.

“No. 667. In the District Court for the District of Alaska, Div. No. 1. J. M. Jenne, Plaintiff, vs. Edward Ehrlich, Alex Smallwood and L. A. Slane, Defendants. Summons for Publication. Filed Dec. 1, 1908. C. C. Page, Clerk. By R. E. Robertson, Assist. Z. R. Cheney, Attorney for Plft., Juneau, Alaska.”

Waive the reading of it? Matter for the Court and not for the Jury—the summons and return thereon.

Mr. CHENEY.—I will waive reading it; yes.

Mr. COBB.—I simply call the attention of the

(Testimony of Henry Shattuck.)

Court that the summons for publication was issued the 25th day of April, 1908, and it was published seven consecutive weeks, and there is no other proof of compliance with it, that is shown on the return. Now I will have to have the Clerk sworn.

COURT.—Very well; want Mr. Malone or Mr. Shattuck?

Mr. COBB.—I guess I better have Mr. Shattuck, the Clerk.

COURT.—Call the Clerk. These last exhibits may be copied hereafter?

Mr. COBB.—Yes, sir.

[Testimony of Henry Shattuck, for Plaintiff.]

Whereupon HENRY SHATTUCK was called and, being duly sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

(Mr. COBB.)

Q. State your name. A. Henry Shattuck.

Q. What is your occupation at present—what official position do you hold? [74]

A. Clerk of the court.

Q. As such you have charge of the records of the court? A. Yes, sir.

Q. State whether or not you have in your custody as clerk the records and files in cause No. 667—A. You have official custody of those records?

A. Yes, sir; I have.

Q. What is that book you hold in your hand?

A. This is a docket.

Q. I will ask you, Mr. Shattuck, if there is in your

(Testimony of Henry Shattuck.)

possession or any record in your office of there having been any affidavit of posting of summons in cause No. 667-A, filed at any time prior to the—I will give you the date in a second—prior to December 8, 1908?

A. I can't testify without an examination—I will have to look it up to see.

Q. Is there any record of it there on your docket?

COURT.—I presume that will be admitted, won't it, Mr. Cheney?

Mr. CHENEY.—Why, I couldn't say whether the docket shows any record or not. I don't think the law requires.

COURT.—I am trying to get at the fact whether or not there was any proof of the filing.

Mr. CHENEY.—I don't think the docket does show it.

Mr. COBB.—Filing an affidavit of mailing of summons.

Mr. CHENEY.—Proof of posting of this.

WITNESS.—A. Seems to be nothing here. Prior to what time?

Mr. COBB.—Q. Prior to December 8, 1908?

A. Here is an affidavit mailing summons—complaint filed.

Q. What date? [75]

A. That is April 25, 1908.

Q. April 25, 1908. Do you know what date that was actually filed?

A. This is dated April 25, 1908, that is as much as I know about that.

Q. You don't know when that entry was made?

A. Well, over that interlined it says "see order

(Testimony of Henry Shattuck.)

April 30, 1910.”

Q. I will recall that to your mind and ask you if that is the affidavit you are referring there to?

Mr. CHENEY.—I think there is a little writing down there.

WITNESS.—A. This must be the affidavit. See order April 30, 1910.

Mr. COBB.—Q. That was actually filed then April 30, 1908, as of that date?

A. Filed as of that date.

Q. Actually filed that date. Is there any other affidavit than the one actually filed on April 30 so far as your records show?

A. This was filed evidently April 30, 1910, as of April 28, 1910.

Q. Now, was there any other affidavit of service of summons filed in that cause 667-A so far as is shown by the records of your office?

A. Seems to be none; no, sir.

That will be all. You may cross-examine.

Cross-examination.

(Mr. CHENEY.)

Q. Now, just a moment, Mr. Shattuck. Now, Mr. Shattuck, you were here in court last May when the case of Von [76]

Q. (Continued.) Arx versus Boone, 781-A, was tried, weren't you? A. I was.

Q. You were then—I don't want to introduce—just what would call them to your attention to this case—what you will recall—you were in court during the trial of that case at all the time heard the trial of

(Testimony of Henry Shattuck.)

the case? A. That is my recollection.

Q. Referring to that entry of proof of summons to Mr. Smallwood, that is your handwriting?

A. It is.

Q. Now, do you recall what the Court's orders were—recall making some minute order of some kind of Judge Cushman's issued here at that time about that being filed *nunc pro tunc*?

Mr. COBB.—We shall object to that as not the proper way to prove a record in the court.

COURT.—It is referred to—the best way is to go get it.

Mr. CHENEY.—I don't know whether there is any order made. He can take the stand and swear to it.

WITNESS.—A. I might find some in my minute-book—the book that I keep in court—it would *to* be down.

Mr. CHENEY.—Q. You remember the circumstance?

A. I remember your stepping up to the desk and speaking about something, but I can't recall the circumstance in detail.

COURT.—Where is that?

A. Down here—that order ought to be on the journal [77]

Mr. CHENEY.—Q. That is in your writing too?

A. Yes.

COURT.—I think you better get the journal of that date and see it.

Mr. COBB.—I think that ought to be introduced at the proper time and not on cross-examination.

(Testimony of Henry Shattuck.)

Mr. CHENEY.—I suppose it is proper cross-examination when he states that he couldn't now recall it. We want to get at the facts.

COURT.—Yes; just as well to have it brought out now.

Mr. COBB.—Oh, yes.

Mr. CHENEY.—Q. Do you find any order?

A. I find an order substantially as in the motion.

Q. Please read the order?

A. Saturday, April 30, 1910: "Victor Von Arx vs. J. M. Jenne, A. J. Boone and D. A. Sutherland, as Marshal for the District of Alaska, Division No. 1. 781-A. Trial continued. On this day this cause came on again regularly for trial; came the plaintiff and counsel John G. Heid, Esquire; came likewise the defendant and counsel, Z. R. Cheney, Esquire; whereupon the following proceedings were had, to wit: Plaintiff's Exhibit 'C' was offered in evidence; whereupon an affidavit of mailing a copy of the complaint and summons was ordered filed *nunc pro tunc* as of April 25, 1908. And after argument had by counsel for the plaintiff and counsel for the defendants, the Court being fully advised in the premises, the Court renders its decision in favor of the defendants, and counsel for the defendants to prepare findings of fact and decree in accordance therewith." Page 281. [78]

Q. That is the order you referred to by your notes on this? A. That is April 30, 1910.

That is all.

COURT.—Anything further, Mr. Cobb?

Mr. COBB.—That is all.

Mr. CHENEY.—As long as the matter has been gone into now by the introduction of these other papers and affidavit of publication, I will offer in evidence this affidavit of proof of mailing the summons to Alex Smallwood.

Mr. COBB.—We object to it as irrelevant and immaterial, and being the *ex parte* statement of a fact without any opportunity for testifying to it; no service on it appearing and never being made on defendant Smallwood or anyone for him, it is not binding upon Mr. Smallwood or anyone in privity with him—of course it also goes to the same objection to be made to the whole record in case the Court overrules that. I only state it now.

COURT.—The objection may be overruled and admitted with the same understanding that it is subject to a motion to strike, supposing that the service was not a good one. Anything further, gentlemen? Of course, I take it that is substantially the only question in the case.

[**Exhibit—Affidavit of Z. R. Cheney, in Jenne vs. Ehrlich.**]

*“In the District Court for the District of Alaska,
Division No. 1 at Juneau.*

“No. 781-A.

J. M. JENNE,

Plaintiff,

vs.

EDWARD EHRLICH, ALEX SMALLWOOD
& L. A. SLANE,

Defendants.

“AFFIDAVIT.

“United States of America,
District of Alaska,—ss.

“Z. R. Cheney, being first duly sworn, on oath deposes and says: I am the attorney for A. J. Boone and D. A. Sutherland, two of the defendants in cause No. 781-A of the records and files of this court; said cause is a suit for an injunction wherein the plaintiff, Victor Von Arx, alleges in his complaint, among other things, that the judgment and decree of this Honorable Court, dated December 8, 1908, is void for the reasons, (1) that the record shows no proof of the mailing of the copy of summons and complaint to Alex Smallwood, one of the defendants in cause No. 667-A of this Court, as required by the order for publication of summons, made and entered in said cause No. 667-A, on April 23, 1908; (2) because there is no proof of service upon either Edward Ehrlich or Alex Smallwood, defendants in cause No. 667-A, of

a copy of the answer of L. A. Slane, one of the defendants in said cause; that the property mentioned and described in the decree is the same property mentioned and described in the executions issued upon said decree and which the plaintiff Von Arx is attempting, in cause No. 781-A, to obtain an injunction to prevent defendant from selling said property.

“Affiant further says that he was the attorney for J. M. Jenne, plaintiff in cause No. 667-A, and that he [79] knows that the copy of the summons and complaint in said cause was mailed on or about the 25th day of April, 1908, affiant further says that on or about the 20th day of April, 1908, while acting as such attorney for J. M. Jenne, he made a trip to Douglas, Alaska, to see Edward Ehrlich and obtain from him the address of the said Alex Smallwood; that he found said Edward Ehrlich at the Beach Store and Lodging House in said Douglas, Alaska, and that said Edward Ehrlich in answer to affiant’s request for such address gave affiant the following address: ‘Alex Smallwood, Riverside P. O., Log Valley, Sask. B. C.’; that thereafter on April 23, 1908, affiant filed an affidavit in said cause No. 667-A showing the non-residence of the said Alex Smallwood and asked for an order of publication of summons as required by law; that on the same day an order for the publication of said summons was duly made and entered in said cause; to which order reference is hereby made; that about two days thereafter, to wit: on or about April 25, 1908, this affiant deposited in the United States postoffice at Juneau, Alaska, in a sealed envelope addressed to Alex Small-

wood, Riverside, Log Valley, Sask. B. C., a true copy of said summons and complaint in said cause No. 667-A, as provided in said order of Court; that said envelope had on the outside thereof a return card giving the name and address of sender of said letter; that affiant never received any reply from said Alex Smallwood and the said envelope was never returned to affiant.

“Affiant further says that he is informed and believes and therefore states the fact to be that the defendant L. A. Slane on or about the 2d day of September, [80] 1908, at Douglas, Alaska, served a copy of his answer in said cause upon the defendant Edward Ehrlich personally and as agent of said Alex Smallwood. Further affiant saith not.

“Z. R. CHENEY.

“Subscribed and sworn to before me this 28th day of April, 1910.

“[Notarial Seal] NEWARK L. BURTON,

“Notary Public for Alaska.

“4/25/1908. No. 667-A. In the District Court for Alaska, Division No. 1, at Juneau. J. M. Jenne, Plaintiff, vs. Edward Ehrlich, Alex Smallwood and L. A. Slane, Defendants. Affidavit of Mailing Summons and Complaint. Filed Apr. 25, 1908. H. Shattuck, Clerk. See Order Apr. 1910. Z. R. Cheney, Attorney for J. M. Jenne. Office: Juneau, Alaska, Lewis Block.”

Mr. COBB.—That is the only question that has been raised.

COURT.—Not very much for the jury to find.

Mr. CHENEY.—If the Court please, now in re-

buttal I will offer the answer of the defendants or affidavit of mine for the publication of summons—counsel is trying to attack the validity of the judgment, I offer findings [81] of fact and conclusions of law and judgment in 781-A where Judge Cushman made and filed in May, 1910, in regard to the same matter. Now, I don't know whether it is necessary to introduce that—in case, probably by calling the Court's attention, he would take judicial knowledge of it.

COURT.—I don't see how it can be admissible under any theory because it would serve as a precedent as any other ruling of the Court if applicable, but it can't affect the proceedings upon which you rely as a basis of evidence.

Mr. COBB.—We object to it being made part of the record because it is irrelevant and immaterial.

Mr. CHENEY.—Can't be that.

COURT.—Yes.

Mr. COBB.—I object to it being made a part of the evidence and offered in evidence for the reason it is wholly irrelevant and immaterial.

COURT.—No; I can't say, Mr. Cheney, of course the Court will take judicial knowledge of it. The only influence it can have is the view that the other judge took of the question when it was before him.

Argument.

Whereupon Court adjourned until ten o'clock tomorrow morning.

[Proceedings Had January 10, 1911.]

And thereafter at ten o'clock in the forenoon of January 10, 1911, this cause again coming on for

trial, and the jury being present, the following proceedings were had:

COURT.—Either party move for a directed verdict?

Mr. COBB.—I wish to do so. [82]

Mr. CHENEY.—I shall move for a directed verdict at the close of the case.

Mr. COBB.—The time is hardly ripe just yet.

COURT.—Very well.

[Motion to Strike Certain Evidence, etc.]

Mr. COBB.—Now, I desire at this time—the entire record in cause No. 667—A being before the Court, all admitted in evidence with the understanding that the objections have been made upon the whole record—I now move the Court to strike out from the evidence the first execution in 1909, the sale thereunder in cause No. 667—A, because the same is not plead as part of the title upon which the defendants rely. I further move the Court to strike from the evidence the entire record in that case upon the ground that the judgment in so far as it purports to be a judgment against Smallwood, in whom the title was vested in 1909, the judgment is entirely void for the reason that the record in that case shows that Smallwood was a nonresident of the District of Alaska, and that the attempted service upon him of summons is absolutely void and the judgment consequently void. The judgment is void for the following reasons: that it was rendered upon service by publication; that the order for the service of publication is void in that it did not direct a service—a posting of the summons directed to the defendant

Alex Smallwood at the last known place of residence as described in the affidavit but simply directed that it be deposited in the postoffice directed to him at his postoffice address in British Columbia. The summons is absolutely void in failing to comply with one of the necessary prerequisites of the statute in that *that* [83] the length of time prescribed in the order is not stated in the summons. A summons, I call the attention of the Court—let me get my motion down then I will argue that further on. The judgment is void for the following reasons: That at the time of the rendition of the pretended judgment as against Smallwood there was on file no proof of posting whatsoever and the attempted curing of that by the filing of a paper *nunc pro tunc* in 1910 cannot cure a void judgment, and for the further reason that the affidavit which is offered as a curative process in itself cannot authorize any judgment for it fails to show that on depositing in the postoffice was the postage prepaid. Now, then that is the motion.

Argument.

Mr. CHENEY.—Now, I don't care to take the time of the Court longer upon this. It seems to me that the defendant is entitled to a judgment—to a verdict by the jury in this case.

COURT.—You want to make your motion of record, same as counsel did.

[Motion for a Directed Verdict, etc.]

Mr. CHENEY.—Yes; I will make the motion. The evidence having been taken, and both sides having rested the case, comes now the defendant and moves

the Court for an order directing the jury to return a verdict for the defendant. I don't think that need to follow the statute—the statute prescribes what the judgment shall be. I think the verdict for the defendant would be all that is required. I haven't got the code with me.

COURT.—Want the code?

Mr. CHENEY.—If the Court please, I want to just see. [84] There is a certain judgment prescribed, I think, under the statute.

COURT.—There is under ejectment.

Mr. CHENEY.—That the plaintiff take nothing by his action. I don't remember how it prescribes—that the defendant is entitled to possession or what. I know I had one judgment before Judge Brown that was reversed on that ground.

COURT.—The verdict should be the way—you should ask for the verdict that the plaintiff is not the owner or entitled to possession of the property. I think that is the statute.

Mr. CHENEY.—That the plaintiff is not entitled to the possession of the property.

COURT.—Yes; I think that is the statute. Proceed, Mr. Cobb.

Argument.

Mr. COBB.—* * * That judgment is absolutely void and we ask for a verdict.

COURT.—Call the jurymen, Mr. Bailiff. Let the record show the jury is all present, Mr. Reporter.

[Decision.]

First, passing upon the motion made by counsel for the plaintiff involves the question of passing on

the case as made by the defendant. The motion requests the Court to strike all the evidence of the defendant concerning the acquisition of the title through the judgment rendered in cause 667-A, Jenne vs. Ehrlich et al., for the reason that the separate answer of the defendant doesn't sufficiently plead the estate of the defendant; and for the further reason that the judgment against Smallwood is void because there was never any service of [85] summons on Smallwood in the case of Jenne against Ehrlich, and the Court had no jurisdiction to enter judgment against him. With reference to the first question it seems to me that the answer might have pleaded the ultimate facts rather than pleading the evidence, but still I think it is sufficiently plead in ejectment to warrant the submission of evidence if the evidence is competent. The judgment in that case was entered—that is in the case of Jenne versus Ehrlich, et al.—foreclosing the mortgage in the first place, and giving judgment for Jenne and one of the defendants, Slane, on certain notes that they held against Ehrlich, that were secured by mortgages. The mortgages were foreclosed giving to Slane the prior lien, and Jenne second lien on the property. Personal service was had upon Ehrlich—service was had upon the defendant Smallwood or at least attempted to be had by publication. Slane appeared and filed his cross-complaint setting up his second mortgage. He failed to serve on either Ehrlich or Smallwood any copy of his cross-complaint; so that the judgment in that case in favor of the defendant Slane against Ehrlich

of course must be void because there was no service or attempted service, but that isn't material in the consideration of the questions now before the Court.

The question is: Was Smallwood properly before the Court so that the Court had jurisdiction to pass upon his title to the property and to foreclose the mortgage on the property as against him as it had against Ehrlich, although personal service was had on Ehrlich. Counsel complains [86] that the order for the publication of summons in the first instance was erroneous because it merely directed the summons and complaint to be forwarded to British Columbia, to the defendant Smallwood at his last-known place of address, omitting to state what that particular address was. The affidavit for publication stated correctly or at least pretended to state correctly what the particular address was, and the Court must accept the record. It must be assumed that it was the correct address on any collateral attack. The proof of the forwarding is in compliance with the affidavit for publication, but counsel says the proof was furnished too late. The proof was not on file at the time the judgment in the cause was entered.

Now, let us see if that is fatal to the jurisdiction of the Court. I think and I not only think so but I am satisfied that the courts bear out the statement that the furnishing of proof is not a condition precedent to the exercise of jurisdiction by the Court so long as it subsequently appears, even after the entry of judgment and before any intervening rights accrued, that the jurisdictional facts existed, that is: that the

man was properly served in accordance with the statute.

The plaintiff in this case acquired his title long after Judge Cushman had permitted the proof to be supplied. An examination of the record prior to plaintiff's purchase would have disclosed the fact that the judgment was a valid judgment, if perfect in every respect except furnishing proof of completion of service. Now, let us see what the Courts have said upon that subject. In *Burr v. Seymour*, reported in 45 *Northwestern*, beginning at page [87] 715, the syllabus provides:

“In an action commenced against a nonresident defendant by publication of the summons, where judgment for want of an answer is properly entered, except that the affidavit of publication is insufficient, if the summons was in fact duly published, and no facts appear to show that it would be unjust to the defendant, or would affect intervening rights of third persons, the Court ought, under sections 124, 125, c. 66, Gen. St. 1878, to allow a proper affidavit of publication to be filed *nunc pro tunc*.”

If it is defective, if it can be amended so as to make it tell the truth, in other words if the original affidavit didn't show jurisdiction and the amended affidavit could show jurisdiction, it is the very same case we have here because the original affidavit was insufficient to show the Court had jurisdiction, but the Court permitted it to be amended to show jurisdictional facts. That case shows conclusively this state of facts—that it is not the proof of jurisdiction, it

is the existence of jurisdiction which affects the judgment. The proof may be afterwards supplied so long as no intervening rights have accrued ; in other words, even if there had been no affidavit of publication at all filed and the judgment was entered but the record were corrected by the furnishing of the proof of the existence of jurisdictional facts before any other intervening rights, the Court will uphold the judgment. The authorities are quite unanimous on this proposition. In the limited time I had to investigate the matter last night while I discovered any quantity of opinion with reference to some of the questions that counsel have raised, I have found no difference of judicial opinion with reference to the right to supply the proof of jurisdictional [88] facts which existed at the date of the entry of judgment. Quoting now from *Frisk et al. vs. Reigelman et al.*, reported in the 43 Northwestern on page 1117, and I read from page 1120:

“There is however a substantial defect in the affidavit of publication, which, if not corrected, would be fatal to the garnishee judgment. The statute (section 2640, Rev. St.) requires the publication to be made ‘not less than once a week for six weeks.’ The affidavit of publication states that the same was printed and published in such newspaper ‘six weeks successfully, commencing,’ etc. That this is not a compliance with the statute is freely conceded by counsel for the plaintiffs. A motion on behalf of the plaintiffs was submitted at the argument for leave to file a corrected affidavit of publication,

and it was shown that the summons was in fact published once a week for six weeks, as required by the order and the statute. The motion must be granted, and the plaintiffs have leave to supply such defect. But it should be supplied in the first instance in the court in which the action was brought and the judgment entered, so that the records of that court may show regular procedure in the action. A corrected affidavit of publication may therefore be filed with the clerk of the Circuit Court, who is directed to transmit the same to this court to be attached to the record herein. Until the receipt thereof judgment will not be entered."

That was long after judgment and it was a direct appeal, not on collateral attack. Also in the case from Kansas, *Hackett et al. vs. Lathrop et al.*, 14 Pacific, 220:

"Where service is made by publication in an action named in section 72, c. 80, Comp. Laws 1879, and the notice is regular in form, but it appears from the proof of publication that the notice was first published only 37 days before judgment, such proof may, after judgment, be amended, in order to show that the notice was in fact first published 44 days before the date of the rendition of the judgment."

I take it therefore that under this showing if the affidavit itself is sufficient, that the judgment is valid as to Smallwood, because the Court did have jurisdiction [89] of him, but at that time didn't have the proof which was afterwards submitted. Even on a

direct attack—in that case it could only result in the setting aside of the judgment, the admission of the proof and the re-entry of judgment and it couldn't be done even in that case or shouldn't be done unless a meritorious defense is offered.

Now, the question is raised as to the proof of forwarding that affidavit; that is, it doesn't affirmatively show that postage was prepaid and counsel has read some general statements from Fitman's Trial Procedure that would seem to indicate that it must affirmatively appear that postage was prepaid. The affidavit does state that there was a return card; the affidavit says that it was sent to his last known place of address. The affidavit does state substantially what the letter of the statute requires, except that it be implied from the words used in the statute that it means postage—I should say postage prepaid. The statute requires that the plaintiff shall also direct a copy of the complaint to be forthwith deposited in the postoffice, directed to the defendant at his place of residence, unless it shall appear that such residence is neither known to the party making the application nor can with reasonable diligence be ascertained. The affidavit was in strict compliance with the statute, because the statute doesn't say that the proof must show postage prepaid; and the court will certainly presume that in favor of its record in the absence of any proof to the contrary that the postage was prepaid, the peculiar wording of the statute is substantially used in the affidavit. [90]

Counsel also attacks the affidavit, but *Pennoyer vs. Neff*, I think settles that question. I don't know

whether I have it here or not. I have the Oregon case which quotes it—that the affidavit cannot be questioned in a collateral attack, reading from the case of *George vs. Nowlan*, 38 Oregon, 537:

“The statute requires that certain facts shall be made to appear by affidavit, to the satisfaction of the Court or judge thereof (*Hill’s Ann. Laws*, #56), before an order of publication is made; and where the affidavit tends to prove such facts, and the Court or judge adjudges it sufficient, such adjudication is conclusive in a collateral proceeding: 17 *Enc. Pl. & Prac.* 78; *Pennoyer vs. Neff*, 95 U. S. 714. The defects in the affidavit referred to could have been taken advantage of by an appeal or some other direct proceeding, but do not furnish ground for an injunction restraining the enforcement of the decree.”

I was unable to get the 9 Oregon, but I have a syllabus stating in the digest that the defect stated in the order of publication cannot be questioned by collateral attack. But the main question relied upon by counsel is the invalidity of the judgment in *Jenne vs. Ehrlich*, on account of the absence of proof of service at date of entry of judgment. Some of the questions raised by counsel may not be subject to collateral attack or may not be the subject of consideration upon collateral attack, the main reason that I sustain the judgment and the title procured under the judgment, is the fact that the proof was supplied although after judgment was entered, yet supplied before the plaintiff acquired any title, no intervening rights having been acquired, under the statute that proof can be

supplied at any time. So, I think the judgment in 667-A, Jenne versus said defendant Ehrlich is good—against Ehrlich and Smallwood. [91]

But counsel contends Ehrlich had no right of redemption, not being a judgment debtor in contemplation of the statute; he having no right of redemption, the attempted redemption could only result in restoring the property to the man who held the legal title. Without passing on the question as to whether Ehrlich could redeem or not, let us see where Smallwood is. Meyers and Slane purchased the property under the judgment rendered in 667-A, Jenne versus Ehrlich—Ehrlich attempted to redeem. There is no evidence in this case that he ever attempted to redeem for Smallwood. If he couldn't redeem, couldn't succeed in redeeming, about all he could take then would be an assignment of their claim. He could take that. It couldn't be said that that was an act which would redound to the benefit of Smallwood, because the evidence indicates that Ehrlich paid it for himself, and, if he did buy it for himself, it couldn't benefit Mr. Smallwood. The payment of the debt by Ehrlich could not result in what counsel claims, that is: relieving the property of the burden of the lien. If he couldn't redeem, I say he must have taken an assignment of the claim and the lien would be in him on the Smallwood property. It appears Smallwood has made no redemption; hasn't tried to acquire any right to the property at all, and he can't come in and claim at this time in an action of this kind where he must rely upon his own title, he can't complain of the action of another even claiming under someone else.

If Ehrlich's title—if such legal title has been given and even if Ehrlich is not a judgment debtor in the contemplation of the statute, which would give him a right to redeem, it is it seems to me an endeavor to redeem not for Smallwood but for himself. [92] He would still have an interest in the property. Whatever interest he had in it would be sold under this judgment. Now, I am not saying that would give a legal title, it certainly gives him a better title than the plaintiff in this case, because in my estimation he has absolutely no title. If I am right in the judgment being valid, the Court is unquestionably correct in the conclusion that Smallwood has no title whatever, and for the reasons assigned, the motion to strike the evidence will be denied.

The motion on the part of the plaintiff also to direct a verdict in favor of the plaintiff will also be denied.

Defendant has moved for a directed verdict and since there is nothing before the Court to submit to the jury, being purely a question of law—the question of rental now having passed out of the case, since the Court holds that the plaintiff hasn't made a case, the Court, therefore, will grant the motion of the defendant to direct a verdict and the jury will be at this time directed to render a verdict that the plaintiff is not the owner or entitled to the possession of the property described in the complaint.

Mr. COBB.—The Court will give us an exception.

COURT.—Yes, sir; let the record show an exception in each instance to the overruling of the motion and to the failure or refusal to direct a verdict in

favor of the plaintiff. But, as before stated, the Court will direct the jury to return a verdict in favor of the defendant that the plaintiff is not entitled to the possession of the property described in the complaint or any part thereof. [93] In this case, I think, where there are less than the proper number of jurors, it would be well to have each juror sign the verdict. Of course, it doesn't make much difference in a directed verdict. Let the verdict be received and filed.

FINIS.

Certificate [of Reporter Transcript].

I, R. E. Robertson, Official Court Reporter for the District Court for the First Division of Alaska, hereby certify that the foregoing and hereto annexed is a true, full and complete transcript, as transcribed and extended from my shorthand notes and the exhibits offered at the trial thereof, of the proceedings taken at the trial of the above-entitled cause.

Dated at Juneau, Alaska, this — day of May, 1911.

Official Court Reporter for the District Court for the First Division of Alaska. [94]

[Certificate and Order Re Bill of Exception.]

And because the above and foregoing matters do not appear of record I, Thomas R. Lyons, the Judge before whom said cause was tried, do hereby certify that the above and foregoing is a full, true and correct bill of exceptions, and the same contains all the evidence offered by both parties to the said cause, and the exceptions and objections taken and allowed,

the same is hereby ordered filed and made a part of the record herein, during the term of court at which said cause was tried.

Dated this the 20th day of May, 1911.

(Signed) THOMAS R. LYONS,

Judge.

[Endorsed]: Filed May 20, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. [96]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Petition for Writ of Error.

Victor Von Arx, conceiving himself to be aggrieved by the verdict and judgment of the court in the above-entitled and numbered cause, comes now by his attorney and petitions the court to grant him a writ of error to the Honorable the U. S. Circuit Court of Appeals for the Ninth Circuit, that the said cause and the proceedings therein may be reviewed by the said Appellate Court; and to fix the sum of security for costs which your petitioners, as plaintiff *at error*, may be required to give upon such writ of error.

And for this he will ever pray, etc.

J. H. COBB,

Attorney for Victor Von Arx.

[Order Allowing Writ of Error.]

Upon the above and foregoing petition and the assignments of error filed herewith, it is ordered that the said writ of error be, and the same, is hereby allowed and the plaintiff in error is required to give a bond for costs for the sum of \$250.00.

Dated this the 29th day of May, 1911.

THOMAS R. LYONS,

Judge.

[Endorsed]: Original. No. 819-A. In the District Court for Alaska, Division No. 1, at Juneau. Victor Von Arx, Plaintiff, vs. A. J. Boone, Defendant. Petition for Writ of Error. Filed May 29, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. Malony & Cobb, Attorneys for Plaintiff. Office: Juneau, Alaska. [97]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Victor Von Arx, as principal, and Emery Valentine, as surety, acknowledge ourselves to be

indebted and firmly bound unto A. J. Boon in the sum of \$250.00, lawful money of the United States, to the payment of which sum, well and truly to be made, we hereby bind ourselves, our, and each of our, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seal and dated this the — day of May, 1911.

THE CONDITION of the above obligation, however, is such that whereas the above bound Victor Von Arx has sued out a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit to reverse the judgment in the above entitled and numbered cause. Now, if the above bound Victor Von Arx shall prosecute his writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be null and void; otherwise to remain in full force and virtue.

Witness our hands this the 27th day of May, 1911.

VICTOR VON ARX,

By J. H. COBB,

His Atty. of Record.

EMERY VALENTINE.

The above and foregoing bond is approved, this the 29th day of May, 1911.

THOMAS R. LYONS,

Judge.

[Endorsed]: Original. No. 819-A. In the District Court for Alaska, [98] Division No. 1, at Juneau. Victor Von Arx, Plaintiff, vs. A. J. Boon, Defendant. Bond on Writ of Error. Filed May 29, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy.

Malony & Cobb, Attorneys for Plaintiff. Office:
Juneau, Alaska. [99]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Assignment of Errors.

Now comes the plaintiff by his attorneys and assigns the following errors committed by the Court upon the trial and in the rendition of the judgment therein and upon which he will rely in the Appellate Court.

1st. The Court erred in ruling and holding that the proceedings in cause No. 667-A, entitled J. M. Jenny vs. Alex. Smallwood et al., were valid as against said Smallwood and that the decree therein and proceedings thereunder divested Smallwood of the title to the property in controversy.

2nd. The Court erred in directing the jury to return a verdict for the defendant.

3rd. The Court erred in refusing to direct the jury to return a verdict for the plaintiff.

And for the said errors the said plaintiff and plaintiff at error prays the Court to reverse the said judgment and remand the cause, with instructions that

upon another trial the court direct a verdict for the plaintiff.

J. H. COBB,
Attorneys for Plaintiff at Error.

[Endorsed]: Original. No. 819-A. In the District Court for Alaska, Division No. 1, at Juneau. Victor Von Arx, Plaintiff, vs. A. J. Boone, Defendant. Assignment of Errors. Filed May 29, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. Malony & Cobb, Attorneys for Plaintiff. Office: Juneau, Alaska. [100]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Writ of Error [Original].

The President of the United States to the Judges of
the District Court for Alaska, Division No. 1,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between Victor Von Arx, plaintiff, and A. J. Boon, defendant, a manifest error hath happened, to the great prejudice and damage of the said plaintiff, Victor Von Arx, as is said and appears in the petition herein:

We being willing that error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in that behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Justices of the Honorable, the U. S. Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, together with this writ, so as to have the same at said place in said Circuit, on or before thirty days after the date hereof so that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and justice and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this the —— day of May, 1911.

Attest my hand and the seal of the District Court for Alaska, Division No. 1, on the day and year last above written.

[Seal]

H. MALONE,

Deputy Clerk District Court, District of Alaska, Division No. 1. [101]

[Endorsed]: Original. No. 819-A. In the District Court for Alaska, Division No. 1, at Juneau. Victor Von Arx, Plaintiff, vs. A. J. Boone, Defendant. Writ of Error. Filed May 29, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. [102]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Citation in Error [Original].

United States of America,—ss.

The President of the United States of America to A.
J. Boon, Greeting:

You are hereby cited and admonished to be and appear in the United States Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error, filed in the Clerk's office of the District Court for Alaska, Division No. 1, wherein Victor Von Arx is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment mentioned in said writ of error, should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 29th day of May, 1911, and of the Independence of the United States the one hundred and thirty-fifth.

THOMAS R. LYONS,

Judge.

Service of the above and foregoing citation in error is admitted to have been duly made, this 29 day of May, 1911.

Z. R. CHENEY,

Attorney for A. J. Boon, Defendant at Error. [103]

[Endorsed]: Original. No. 819-A. In the District Court for Alaska, Division No. 1, at Juneau. Victor Von Arx, Plaintiff, vs. A. J. Boone, Defendant. Citation in Error. Filed May 31, 1911. E. W. Pettit, Clerk. By J. J. Clark, Deputy. [104]

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Order Extending Time to File Transcript.

Because there is not sufficient time to make return to the writ of error in the above cause, within the thirty days from the date of said writ, the time for returning the same and filing the transcript in the Appellate Court, is, on application of plaintiff's counsel, hereby extended until and including the fifteenth day of August, 1911.

Dated this June 2, 1911.

EDWARD E. CUSHMAN,

Presiding Judge in Division No. 1.

[Endorsed]: No. 819-A. In the District Court for Alaska, Division No. 1, at Juneau. Victor Von Arx, Plff., vs. A. J. Boone, Deft. Order Extending Time

to File Transcript. Filed Jun. 2, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. J. H. Cobb, Atty. for Plff. [105]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 819-A.

VICTOR VON ARX,

Plaintiff,

vs.

A. J. BOONE,

Defendant.

Praeipce [for Transcript of Record].

To the Clerk of the District Court for Alaska, Division No. 1.

You will please make up a transcript to the record for Writ of Error in the above-entitled cause and include the following pleadings and papers, to wit:

- (1) Complaint.
- (2) Answer.
- (3) Reply.
- (4) Judgment.
- (5) Bill of Exceptions.
- (6) Petition for Writ of Error.
- (7) Bond on Writ of Error.
- (8) Assignment of Writ of Error.
- (9) Writ of Error Original.
- (10) Citation Original.
- (11) Order Extending Time to File Transcript.
- (12) This Praeipce.

Said transcript to be made up in accordance with

the rules of practice of the United States Circuit Court of Appeals of the Ninth Circuit and the rules of this court.

J. H. COBB,

Attorneys for Victor Von Arx.

[Endorsed]: Original. No. 819-A. In the District Court for Alaska, Division No. 1, at Juneau. Victor Von Arx, Plaintiff, vs. A. J. Boon, Defendant. Praecipe. Filed Jul. 13, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. Malony & Cobb, Attorneys for——— Office: Juneau, Alaska. [106]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 819-A.

VICTOR VON ARX,

Plaintiff, and Plaintiff in Error,

vs.

A. J. BOONE,

Defendant, and Defendant in Error.

Certificate [of Clerk U. S. District Court to Record].

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the foregoing and hereto attached one hundred and six pages of typewritten and written matter, numbered from one to one hundred and six, both inclusive, constitute a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of the plaintiff and plaintiff in error on file in my office and made a part

hereof, in Cause No. 819-A of the above-entitled court, wherein Victor Von Arx is plaintiff and plaintiff in error, and A. J. Boone is defendant and defendant in error.

I do further certify that the said record is by virtue of Writ of Error and Citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the costs of preparation, examination and certificate, amounting to Thirty and 80/100 Dollars (\$30.80), have been paid to me by Malony & Cobb, attorneys for plaintiff and plaintiff in error.

In witness whereof I have hereunto set my hand and affixed the seal of the above-entitled court this 8th day of August, 1911.

[Seal]

E. W. PETTIT,

Clerk of District Court, Dist. of Alaska, Division
No. 1.

[Endorsed]: No. 2017. United States Circuit Court of Appeals for the Ninth Circuit. Victor Von Arx, Plaintiff in Error, vs. A. J. Boone, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed August 15, 1911.

F. D. MONCKTON,

Clerk.

By Meredith Sawyer,

Deputy Clerk.

NO. 2017

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR VON ARX, Plaintiff in Error,

vs.

A. J. BOONE, Defendant in Error.

**Upon Writ of Error to the United States District
Court for the District of Alaska, Division No. 1.**

BRIEF OF PLAINTIFF IN ERROR

J. H. COBB,

Attorney for Plaintiff in Error.

FILED

NO. 2017

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR VON ARX, Plaintiff in Error,

VS.

A. J. BOONE, Defendant in Error.

Upon Writ of Error to the United States District
Court for the District of Alaska, Division No. 1.

BRIEF OF PLAINTIFF IN ERROR

J. H. COBB,

Attorney for Plaintiff in Error.

STATEMENT OF THE CASE

This is an action in ejectment brought by the plaintiff in error against the defendant in error, to recover the possession of certain lots and buildings in Douglas City, Alaska, and rentals for the withholding thereof. The parties hereinafter will be respectively referred to as plaintiff and defendant.

The plaintiff in his complaint alleged ownership of the property and a possessory title thereto and plead and claimed a common source of title in plaintiff and defendant, respectively from one Edward Erlich, (Rec., 1-2).

The defendant in his answer denied generally all the allegations of the complaint and further specifically alleged title from and under Edward Erlich by virtue of a certificate of purchase made by the United States Marshal for the District of Alaska, Division No. 1, on May 2, 1910, in cause No. 667-A which certificate is set out in full in the answer, (Rec., 5-7.)

This certificate of purchase purports to be made by virtue of a writ of execution issued out of the said court on the 8th day of March A. D. 1910 in cause No. 667A in favor of J. M. Jenne, plaintiff and against Edward Erlich, defendant, and further recites a levy on the property in controversy made on the 9th day of March, 1910, and a sale thereunder of all the interest of the said Erlich held on the 8th

day of December, 1908, or at any time thereafter.

The defendant by his reply denied that Erlich was the owner or had any right or title of interest in the property at the time of the proceedings in the answer alleged, but admitted that such proceedings constituted the nature and basis of the defendant's claim to said property.

The plaintiff introduced in evidence the following chain of title.

First: A deed from Ed Erlich to Alexander Smallwood conveying the property in controversy and other property. Dated February 13, 1905. (Rec., 17-20.)

Second: A power of attorney from Alexander Smallwood to Edward Erlich dated April 16, 1907. (Rec., 23-25.). This power of attorney is a general one.

Third: A deed from Alexander Smallwood by Edward Erlich, his agent and attorney in Fact to the plaintiff, Victor Von arx, dated July 18, 1910, conveying the property in controversy. (Rec., 27-28).

Fourth: Plaintiff next offered the admission of the defendant that the property in controversy was of the reasonable rental of \$30.00 per month. (Rec., 29).

The plaintiff was next sworn as a witness on his own behalf and testified in substance; that in the year 1905 and prior to that time Edward Erlich was

in the possession of the property in controversy carrying on business therein and had improved the same. Rec., 30-32).

The defendant then offered in evidence the following evidence to wit:

First: A purported decree of the District Court for Alaska Division No. 1 in cause No. 667A entitled J. M. Jenne, Plaintiff, Vs. Edward Erlich, Alexander Smallwood and L. A. Slane, Defendants. This decree is in the ordinary form and purports to foreclose a mortgage executed by Edward Erlich in favor of J. M. Jenne dated November 2, 1902, for the sum of \$1,000.00, and also a mortgage executed by Edward Erlich in favor of the defendant, L. A. Slane, dated July 2, 1902, for the sum of \$400.00 and directing a sale of the property. (Rec., 35-38).

Second: A deed from the United States Marshal to Edward Erlich dated the 5th day of March, 1910. (Rec., 39-42).

This instrument recites among other things: That "whereas, at the regular December, 1908 term of the district Court of the United States held at the town of Juneau, and for said District and Division on the eighth day of December, in the year A. D. 1908, J. M. Jenne, plaintiff, and L. A. Slane, one of the defendants respectively recovered judgment against Edward Erlich, defendant, in a certain plea for the following sums, to wit: eleven hundred three dollars and two cents (\$1103.02) and twenty-nine dol-

lars and ten cents (\$29.10) costs of suit, and six hundred twenty-one dollars and eighty-three cents (\$623.83); and

“Whereas, on the 28th day of December, A. D. 1908, there issued out of said District Court an order of sale and execution in the said action for the collection of said judgment, which said order of sale and execution was directed to James M. Shoup, the then United States Marshal in and for said District of Alaska, Division No. One, and that said order of sale and execution were executed by the said James M. Shoup, the then United States Marshal, by said case made and provided on the first day of February, A. D. 1909, upon a certain tract or parcel of land hereinafter described,” etc. The deed then further recites in substance the due advertisement of part of the property in controversy for sale and the sale thereof to one George Meyers. It further recites the payment by Edward Erlich the amount of the purchase price and costs within the year allowed by law for redemption, to wit, the 5th day of March, 1910. The deed then proceeds,

“Now, therefore, I, Daniel A. Sutherland, United States Marshal of said District and Division by virtue of my office and by force of the Statute in such case made and provided, for and in consideration of the sum of one hundred ninety-three and 23-100 dollars (\$193.23) in hand to me paid by the said Edward Ehrlich party of the second part, have granted, bar-

gained and sold and by these presents do grant, bargain and sell unto the said Edward Ehrlich all the right, title, interest and claim, which the said defendant Edward Ehrlich and Alex Smallwood on the day of sale aforesaid, had in and to the following described tract or parcel of land, to wit:" then following a description of part of the property in controversy. (Rec., 39-42.)

Third: A Marshal's deed of the United States Marshal for Alaska, Division No. 1, to the defendant, identical in its recitals with the former, and purporting to convey the remainder of the property in controversy. (Rec., 43-46.)

Fourth: The defendant next offered in evidence a writ of execution issued in Cause No. 667A, dated March 8th, 1910, which execution recites a judgment in favor of J. M. Jenne against Edward Ehrlich defendant, for the sum of one thousand three and 2-100 dollars (\$1,003.02) and the sum of twenty-nine and 10-100 dollars (\$29.10) costs. It further recites a credit upon said judgment of one hundred sixty-six and 25-100 dollars (\$166.25). It then directs that the balance nine hundred seventy-nine and 7-100 dollars (\$979.07) be made out of the property of the said Edward Ehrlich. (Rec., 48-49.)

Fifth: The return upon said execution showing that on the 2nd day of May, 1910, that the property in controversy was purchased thereunder by the defendant, A. J. Boone for the sum of \$825.00. (Rec.,

50-54.)

Sixth: An order of the Court confirming said sale. (Rec., 56-57.)

Seventh: A certificate of purchase executed by the Marshal to the defendant, A. J. Boone, certifying that on the 2nd day of May, 1910, he sold under the execution aforesaid all the right, title, and interest of the defendant Edward Ehrlich, in and to the property in controversy. (Rec., 58-60.)

Eighth: The defendant called as a witness in his own behalf testified in substance that he had been in possession of the property for some 18 months and that he was the person who purchased the property at the Marshal's sale and received the certificate of purchase and had paid the purchase money named therein. (Rec., 61-62.)

The plaintiff in rebuttal, for the purpose of showing the invalidity of the purported decree of foreclosure as against Alexander Smallwood, offered the balance of the judgment roll therein, to wit:

First: Affidavit for publication of summons. (Rec., 63-64.)

Second: The order for publication of summons. (Rec., 66-67.)

Third: The summons for publication. (Rec., 68-69.)

Fourth: Proof of publication. (Rec., 69.)

Fifth: The summons. (Rec., 70-71.)

Sixth: The Clerk of the Court was called as a wit-

ness, who testified in substance; that there was no affidavit or proof of mailing the summons for publication to the defendant Smallwood prior to the date of the judgment therein in cause No. 667A; that there was an affidavit filed April 30, 1910, as of April 25, 1908; that this was done pursuant to the following order:

“Victor Von Arx vs. J. M. Jenne, A. J. Boone and D. A. Sutherland, as Marshal for the District of Alaska, Division No. 1. 781-A. Trial continued. On this day this cause came on again regularly for trial; came the plaintiff and counsel John G. Heid, Esquire; came likewise the defendant and counsel, Z. R. Cheney, Esquire; whereupon the following proceeding were had, to wit: Plaintiff’s Exhibit “C” was offered in evidence: whereupon and affidavit of mailing a copy of the complaint and summons was ordered filed nunc pro tunc as of April 25, 1908.” (Rec., 72-77.)

This order was made in cause 781-A not cause 667-A and was made April 30, 1910. (Rec., 76.). The defendant then offered the evidence the Affidavit. (Rec., 78-80.)

This was all the evidence introduced by either parties. At the conclusion of the evidence both parties moved the court for a directed verdict. (Rec., 83-84.)

The Court thereupon denied the plaintiff’s motion for directing a verdict and granted the defendant’s

to which the plaintiff accepted. (Rec., 92.)

It is contended by the plaintiff in error, First: the decree in cause No. 667-A is absolutely void as against all the defendants thereto.

Second: That if not void as to all the defendants it is void as to the defendant Alexander Smallwood.

Third: That even if said decree is not void as to any of the parties thereto the proceedings had thereunder failed to divest the title out of Alexander Smallwood, the owner of the property, at the time such proceedings were had and that the plaintiff in any event was entitled to a directed verdict in his favor.

In order to present these questions squarely to the Court we will briefly state the record: The affidavit for publication of the Summons (Rec., 63-64) shows that at the time said suit was brought Smallwood was a non-resident of the District of Alaska and there was no pretense that personal service of the summons was ever had upon him. The order for the publication of the summons, (Rec., 66-67) directs that the summons be published in the Transcript, a weekly newspaper printed and published in Juneau, Alaska, for the period of six weeks, once in each week, and the plaintiff's attorney mail a copy of said summons and complaint in said cause to the defendant, Alexander Smallwood at his place of residence in British Columbia forthwith.

The summons for publication, (Rec. 68-69) com-

mands the defendant Alexander Smallwood to appear "within thirty (30) days after the completion of the period of publication of the summons." It gives the date of the order for the publication of the summons but does not states the period prescribed for the publication. (Rec. 70-71.)

The decree shows that none of the defendants appeared and bears date the 8th day of December, 1908. At that time there was no proof on file that a copy of the summons and complaint had been mailed to Alexander Smallwood, such proof not being made until the 28th day of April, 1910, when it was filed non pro tunc pursuant to an order made on April 30, 1910, in cause No. 781-A entitled Victor Von Arx vs. J. M. Jenne, A. J. Boone and D. A. Sutherland. There was never any order made in Cause No. 667-A in which the judgment was rendered.

At the conclusion of the evidence the Court ruled and held that the decree was valid in cause No. 667-A and that the proceedings thereunder as shown by the evidence was sufficient to divest the title out of Smallwood and thereupon denied plaintiff's motion for an instructed verdict and granted the motion of the defendant for an instructed verdict.

Verdict was returned accordingly and judgment entered thereon and to the judgment this Writ of Error is sued out and the plaintiff assigns the following errors:

FIRST

“The Court erred in ruling and holding that the proceedings in cause No. 667-A, entitled J. M. Jenne vs. Alex. Smallwood et al., were valid as against said Smallwood and that the decree herein and proceedings thereunder divested Smallwood of the title to the property in controversy.”

SECOND

“The Court erred in directing the jury to return a verdict for the defendant.”

THIRD.

“The Court erred in refusing to direct the jury to return a verdict for the plaintiff.” (Rec. 98.)

ARGUMENT.

From the foregoing statement it is apparent, that plaintiff having a regular chain of title from and under Ehrlich through Smallwood, was entitled to recover, unless, by the proceedings instituted in 1908, in the case of Jenne vs. Ehrlich, Smallwood and Slane, the then title of Smallwood was in some way divested out of him, and vested again in Ehrlich, and thence in the defendant Boone.

There are two reasons why the title of Smallwood was not affected by such proceedings:

FIRST: THE JUDGMENT, or DECREE IN CAUSE 667-A IS VOID.

SECOND: EVEN IF SUCH DECREE WERE

VALID THE PROCEEDINGS IN QUESTION WERE INSUFFICIENT TO PASS SMALLWOOD'S TITLE TO EHRLICH; AND EHRLICH HAD NO TITLE TO BE AFFECTED BY THE JUDICIAL SALE HAD IN 1910 UNDER THE EXECUTION IN CAUSE NO. 667-A.

FIRST: THE INVALIDITY OF THE DECREE IN CAUSE 667-A OF DATE DEC. 8, 1908.

The judgment roll in the case shows that Smallwood was a non-resident of Alaska. Substituted service of process was attempted to be made upon him. Is it sufficient to give the court jurisdiction, under the Alaska Statutes?

Section 47, Carter's Code, provides for constructive service in a case such as that of Jenne vs. Ehrlich et al. No. 667-A.

The sixth subdivision of the section provides further that "The summons published shall contain the name of the Court, and the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication and the time within which the defendant is required to answer the complaint."

Section 48 reads as follows:

"MANNER OF PUBLICATION. The order shall direct the publication to be made in a newspaper to be designated by the court or judge or clerk as the most likely to give notice to the person to be serv-

ed, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant at his place of residence, unless it shall appear that such residence is neither known to the party making the application nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the district shall be equivalent to publication and deposit in the post-office. In either case, the defendant shall appear and answer within thirty days after the completion of such period of publication. In case of personal service out of the district, summons shall specify the time prescribed in the order for publication.

Section 52 provides:

“Proof of the service of the summons, or of the deposit thereof in the post-office, shall be as follows:

First: If the service, or deposit in the post-office be by the Marshal or his deputy, the certificate of such officer;

Second: If by any other person his affidavit thereof.”

Waiving any question as to the sufficiency of the affidavit for the publication and the order, (though both are questionable) let us examine the summons and the proof of service.

The order directed the summons to be published "in the Transcript, a weekly newspaper printed and published at Juneau, Alaska, for the period of six weeks, once in each week and that plaintiff's attorney mail a copy of said summons and complaint in said cause to the defendant, Alex. Smallwood, at his place of residence, in British Columbia forthwith." (Rec. 66-67.)

The summons commands the defendant Smallwood to appear in "thirty days after the completion of the period of publication."

"The order for publication of this summons is dated April 23, 1908." (Rec. 68-69.)

Will G. Ulrich, publisher of the "Alaska Weekly Transcript" makes affidavit July 1, 1908, that the summons had been published in each weekly issue of said paper for 7 consecutive weeks, the first publication being May 2nd and the last June 13, 1908. (Rec. 69.)

There was no other return to the summons or other proof of compliance with the order of Court in the record. (Rec. 71-76.)

On December 8, 1908, on this record the Court proceeded to render the decree.

Subsequently in cause No. 781-A the Court made an order dated April 30, 1910, permitting an affidavit of posting to be filed, NUNC PRO TUNC. (Rec. 76.)

The attorney for defendant thereupon filed the

following affidavit:

UNITED STATES OF AMERICA,
DISTRICT OF ALASKA—SS.

“Z. R. Cheney, being first duly sworn, on oath deposes and says: I am the attorney for A. J. Boone and D. A. Sutherland, two of the defendants in cause No. 781-A of the records and files of this court; said cause is a suit for an injunction wherein the plaintiff, Victor Von Arx, alleges in his complaint, among other things, that the judgment and decree of this Honorable Court, dated December 8, 1908, is void for the reasons, (1) that the record shows no proof of the mailing of the copy of summons and complaint to Alex. Smallwood, one of the defendants in cause No. 667-A of this Court, as required by the order for publication of summons, made and entered in said cause No. 667-A, on April 23, 1908, (2) because there is no proof of service upon either Edward Ehrlich or Alex. Smallwood, defendants in cause No. 667-A, of a copy of the answer of L. A. Slane, one of the defendants in said cause; that the property mentioned and described in the decree is the same property mentioned and described in the executions issued upon said decree and which the plaintiff Von Arx is attempting, in cause No. 781-A, to obtain an injunction to prevent defendant from selling said property.

“Affiant further states that he was the attorney

for J. M. Jenne, plaintiff in cause No. 667-A, and that he knows that the copy of the summons and complaint in said cause was mailed on or about the 25th day of April, 1908, affiant further says that on or about the 20th day of April, 1908, while acting as such attorney for J. M. Jenne, he made a trip to Douglas, Alaska, to see Edward Ehrlich and obtain from him the address of the said Alex. Smallwood; that he found Edward Ehrlich at the Beach Store and Lodging House in said Douglas, Alaska, and that said Ehrlich in said affiant's request for such address gave affiant the following address: 'Alex Smallwood, Riverside P. O., Log Valley, Sask., B. C.;' that thereafter on April 23, 1908, affiant filed an affidavit in said cause No. 667-A showing the non-residence of the said Alex. Smallwood and asked for an order of publication of summons as required by law; that on the same day an order for the publication of said summons was duly made and entered in said cause; to which order reference is hereby made; that about two days thereafter, to wit: on or about April 25, 1908, this affiant deposited in the United States post-office at Juneau, Alaska, in a sealed envelope addressed to Alex. Smallwood, Log Valley, Sask., B. C., a true copy of said summons and complaint in said cause No. 667-A, as provided in said order of Court; that said envelope had on the outside thereof a return card giving the name and ad-

dress of sender of said letter; that affiant never received any reply from said Alex Smallwood and the said envelope was never returned to affiant.

“Affiant further says that he is informed and believes and therefore states the fact to be that the defendant L. A. Slane on or about the 2nd day of September, 1908, at Douglas, Alaska, served a copy of his answer in said cause upon the defendant Edward Ehrlich personally and as agent of said Alex. Smallwood. Further affiant saith not.”

Z. R. CHENEY.

“Subscribed and sworn to before me this 28th day of April, 1910.

(Notarial Seal) NEWARK L. BURTON,
Notary Public for Alaska.”

Rec. 78-80.)

That when a court proceeds to render judgment or decree upon substituted service of its process every step prescribed by the statute must be strictly complied with in order to authorize such decree, is an axiom of the law of judgments.

Passing the minor irregularities in the proceedings leading to the decree in question, there are two defects, so gross as, in our opinion, to render the decree plainly void:

First: The summons itself was void, in that it failed to state the “TIME WITHIN WHICH THE DEFENDANT WAS REQUIRED TO ANSWER THE COMPLAINT.”

The provisions of the Alaska Code governing the necessary prerequisites to a judgment on substituted service are taken directly from the code of Oregon. At the time of their adoption by Congress, they had received a definite construction. In the case of *Odell vs. Campbell*, 9 Ore. 298, the Supreme Court of Oregon had before it the question whether a summons, served by publication which failed to state the date of the order for publication would support a judgment, and the Court said:

“The next objection is, that the summons published does not contain the date of the order for service by publication. Section 55 of the code of procedure provides, among other things, that ‘Summons published shall contain the name of the court and the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication and the time within which the defendant is required to answer the complaint.’ The summons published in this case contains all these several matters except the date of the order for service by publication. Where the statute prescribes certain things which the summons published shall contain, they must be deemed essential and necessary, and the absence of any of them in the summons published is not a compliance with its requirements. Nor do we think that this provision of the statute is merely directory, as claimed, but mandatory. For, if the summons may omit the date

of the order for service by publication, and still be held sufficient, why not with equal reason, 'the succinct statement of relief demanded,' or the name of the court and title of the cause. or any other matter which this provision requires the summons shall contain? In the eye of the law one is as essential as the other, and none can be omitted without vitiating the summons published. It seems to us no one would claim a summons which omitted to state these matters required by the statute, could be held valid."

In this case it is true, the omission was of the date of the order of publication, while here the defect is the failure to state the time within which the defendant is to appear. But the reason for one is as strong as for the other; each is a requisite prescribed by the statute.

Odell vs. Campbell is cited with approval by Judge Deady in Swift vs. Meyers 37 Fed. 37.

But it may be contended the summons does state that the defendant is commanded to appear "within thirty days after the completion of publication" and that this is sufficient. But is it? A question identical in principal has been before the Supreme Court of Washington in a number of recent decisions, and we believe these cases decisive of the point.

A statute of the state enacted that a summons to be served by publication should direct the defendant

“to appear withing sixty days after the date of the first publication of the summons exclusive of the day of said first publication.” In *Thompson vs. Robbins*, 72 Pac. 1043, the summons published directed the defendant to appear “sixty days after the service of the summons upon him.” The summons was held void, for uncertainty, and not to support a judgment by default. In *Owen vs. Owen* 84 Pac. 606 the summons published required the defendant “to appear withing sixty days (after the service of this summons exclusive of the first publication of summons) which will be on the 6th day of June 1901.” This summons, it was said by the Court, “leaves it indefinite and uncertain as to the time within which appellant was required to answer. This is fatal to its validity.”

In *Baur vs. Widholm* 95 Pac. 277, the published summons read: “you and each of you are hereby directed and summoned to appear within sixty days after the service of this notice and summons upon you exclusive of the date of service.” Of this summons the Court said: “It omitted any statement of, or reference to the particular day upon which its service would be completed, and was therefore so indefinite and uncertain in fixing the time of appearance as to render it defective and avoid the judgment.”

See also cases cited, 95 Pac. 278.

Now in the case at bar section 48 of the Alaska Code quoted above leaves it optional with the Court to prescribe any length of time for publication deemed reasonable, not less than six weeks.

The summons directs the defendant to appear "within thirty days from the completion of the period of publication." But what is that period? All that the summons reveals is that the order was made on April 23rd, 1908; but whether the period prescribed was six weeks, the minimum, or eight weeks, or three months, the recipient of the notice was left wholly in the dark. We think the summons void.

There being no proof of the mailing of the copy of the summons and complaint on file at the time of the rendition of the decree the Court was without jurisdiction. And the judgment being void when rendered, could not be validated by subsequently filing such proof.

In *Gray vs. Larimore* 4 Saw. 638, Mr. Justice Field, sitting in the Circuit Court in this Circuit, had before him a judgment rendered in service by publication in which no proof of publication was filed. (Page 646). The judgment was held void. Mr. Fitman in his excellent work on Trial Procedure at Section 281 P. 371, says this "Proof of mailing is indispensable."

But the Court below held it could be supplied at any time afterward to save the judgment. In other

words a void judgment—void on the face of the record—may be validated when attacked, by the filing of an affidavit, even in another and different case.

We think the judgment in cause No. 667-A absolutely void for the reasons stated. If it was void as to Smallwood, for want of jurisdiction as to him, it was void as to all the other defendants under the authority of *Gray vs. Larimore* 4 Saw. 644.

SECOND

BUT EVEN IF THE JUDGMENT IN CAUSE NO. 667-A IS NOT VOID THE PROCEEDINGS HAD THEREUNDER DID NOT DIVEST THE TITLE OF ALEXANDER SMALLWOOD, AND THE PLAINTIFF HAVING A DEED FROM HIM WAS ENTITLED TO AN INSTRUCTION TO THE JURY TO FIND FOR HIM.

On February, 13th, 1905, Edward Ehrlich sold and conveyed the property in controversy to Alexander Smallwood. Rec. 17-21). This deed was filed for record the same day.

July 18th, 1910, Smallwood, by deed of that date, sold and conveyed the same property to the plaintiff. (Rec. 27-29.)

Plaintiff then had the title of Ehrlich the common source, unless that title was otherwise divested out of one or the other of them, in the meantime.

It was the defendant's contention, and the Court held that the decree in No. 667-A, and the proceedings thereunder introduced in the evidence, had this

effect.

Let us examine these proceedings as shown in the record, and see if this contention is tenable.

The decree of foreclosure (Rec. 35-38) purports to be against both Edward Ehrlich and Alexander Smallwood. It is dated the 8th day of December, 1908, and if it had been followed by a proper execution and sale of the interest of both said defendants, and if it were valid, it would have passed their title and there would have been no title in Smallwood for the plaintiff to take by his deed of July 18, 1910.

The defendant, however, failed to introduce any execution whatever against Smallwood. In other words it would appear from this record, inferentially at least, that after the decree was entered the counsel for the plaintiff in that cause became satisfied that the decree was void, at least in so far as the defendant Smallwood was concerned. What the proceedings were under said judgment in 1908 the defendant did not attempt to show, but his exhibit "B", being the United States Marshal's deed (Rec. 39-42) does not recite any decree or foreclosure whatever against Smallwood. The recitals are as follows:

"Witnesseth: That whereas, at the regular December, 1908, term of the District Court of the United States held at the town of Juneau, in and for said District and Division on the eighth day of December, in the year A. D. 1908, J. M. Jenne, plaint-

iff, and L. A. Slane, one of the defendants respectively recovered judgment against Edward Ehrlich, defendant in a certain plea for the following sums, to wit: eleven hundred three dollars and two cents (\$1103.02) and twenty-nine dollars and ten cents (\$29.10) costs of suit, and six hundred twenty-one dollars and eighty-three cents (\$621.83; and

“Whereas, on the 28th day of December, A. D. 1908, there issued out of said District Court an order of sale and execution in the said action for the collection of said judgment, which said order of sale and execution were directed to James M. Shoup, the then United States Marshal in and for said District of Alaska, Division No. One, and that said order of sale and execution were executed by the said James M. Shoup, the then United States Marshal” etc.

The deed then recites a sale of a portion of said property for the sum of one hundred seventy-five and 00-100 dollars (\$175.00) to one George Meyers and the payment of the purchase money by him. The recitals then continue:

“Whereas, on the second day of March, 1910, and within twelve months after the confirmation of said sale of said premises to the said George Meyers, came Edward Ehrlich, the judgment debtor in said cause entitled J. M. Jenne vs. Edward Ehrlich, Alexander Smallwood and L. A. Slane, being cause No. 667-A of the records of said District Court, and redeemed said property by paying to Daniel A. Suth-

erland, the United States Marshal, and the party of the first part herein, the sum of one hundred ninety-three dollars and twenty-six cents (\$193.26) said sum being the amount of the purchase price paid by the said George Meyers with interest at the rate of 8 per cent. per annum thereon from February 1st, 1908, the date of the sale, together with taxes paid by the said George Meyers thereon after the purchase thereof by him at said Marshal's sale; and the said Edward Ehrlich thereupon received a certificate of redemption executed by the said Daniel A. Sutherland, United States Marshal, bearing date the second day of March, 1910, by virtue of which redemption and certificate the said Edward Ehrlich and his assigns become entitled to a deed of said premises from the said United States Marshal according to law on this 5th day of March, 1910.

“Now, therefore, I, Daniel A. Sutherland, United States Marshal of said District and Division by virtue of my office and by force of the Statute in such case made and provided, for and in consideration of the sum of one hundred ninety-three dollars and 23-100 dollars (\$193.23) in hand to me paid by the said Edward Ehrlich party of the second part, have granted, bargained and sold and by these presents do grant, bargain and sell unto the said Edward Ehrlich all the right, title, interest and claim, which the said defendant Edward Ehrlich and Alex Small-

wood on the day of sale aforesaid, had in and to the following described tract or parcel of land, to wit: two lots and buildings thereon" etc. The defendant also introduced in evidence a Marshal's deed, covering the balance of the property in suit, (Rec. 43-47) which is identical with the above quoted recitals, except it is for another parcel of the property in controversy and the purchaser was L. A. Slane and the purchase price was three hundred dollars (\$300.00). The other muniments of title introduced by the defendant was an execution issued against Edward Ehrlich alone, commanding the Marshal to make the sum of nine hundred seventy-nine and 7-100 dollars (\$979.07), issued the 8th day of March 1910 (Rec. 48-49) and the return thereunder showing a sale of the property in controversy to the defendant A. J. Boone; an order confirming said sale (Rec. 56-57); and the Marshal's certificate of purchase thereunder (Rec. 58-60).

From the above and foregoing it is clear,

First: That Edward Ehrlich having sold and conveyed the property in controversy to Alex Smallwood in February, 1905, had no title upon which personal judgment in cause No. 667-A could operate.

Second: That such execution against Edward Ehrlich could not affect any title held by Alex Smallwood even though Smallwood was a party to the judgment, as such execution could not empower the Marshal to sell the property of anyone but Ehr-

lich.

Third: The fact that Edward Ehrlich may have attempted to redeem the property and received the deeds from the Marshal shown in the evidence in no way authorized the Marshal or empowered him to convey any title held by Smallwood.

Fourth: A redemption of property from execution sale under the Alaska Code does not convey any title. The effect of such redemption is simply to terminate the sale and leave the title of the property exactly where it was prior to the sale. Sec. 291 of the Alaska Code Page 207 provides among other things, "if the judgment debtor redeem at any time before the time for redemption expires, the effect of the sale shall terminate and he shall be restored to his estate." Of course, it is obvious that the term "judgment debtor" used in the statute refers to the judgment debtor whose property is sold, not to his co-debtor whose property has not been sold.

Summing up then we find the plaintiff with a complete chain of title from and under Edward Ehrlich the common source, of title.

The defendant attempted to meet this evidence by showing that the decree and the proceedings thereunder in some way divested the title out of Smallwood and vested it again in Ehrlich, and that the title of Ehrlich through Smallwood back to Ehrlich passed to him.

But we think it too clear for further argument

that Smallwood's title to the property could not be affected by the decree in cause No. 667-A for the reason:

First: That such decree was void as against him.

Second: For the further reason that such proceedings being directed solely against Edward Ehrlich, in no manner affected the title of Alex. Smallwood. "Freeman on Executions," Sec: Ed. Sec. 335; cites to the effect: that a purchaser at execution sale obtains the title of the defendant in execution and none other.

For the reasons stated the plaintiff in error prays that the judgment of the District Court be reversed with costs and remanded to the lower court with instructions that upon another trial the jury be instructed to render a verdict for the plaintiff.

Respectfully submitted,

J. H. COBB,

Attorney for Plaintiff in Error.

No. 2017

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

VICTOR VON ARX,

Plaintiff in Error,

vs.

A. J. BOONE,

Defendant in Error.

Upon Writ of Error to the United States District
Court for the District of Alaska,
Division No. 1.

BRIEF OF DEFENDANT IN ERROR.

Z. R. CHENEY,

Attorney for Defendant in Error.

FILED

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2017.

VICTOR VON ARX,

Plaintiff in Error,

vs.

A. J. BOONE,

Defendant in Error.

Upon Writ of Error to the United States District
Court for the District of Alaska, Division No. 1.

Brief of Defendant in Error.

BRIEF OF THE ARGUMENT.

Plaintiff in error seeks to reverse the judgment of
the lower court upon the following assignments of
error:

FIRST.

“The Court erred in ruling and holding that the
proceedings in cause No. 667-A, entitled J. M. Jenne
vs. Alex. Smallwood et al., were valid as against said
Smallwood, and that the decree herein and proceed-
ings thereunder divested Smallwood of the title to
the property in controversy.”

SECOND.

“The Court erred in directing the jury to return
a verdict for the defendant.”

THIRD.

“The Court erred in refusing to direct the jury to
return a verdict for the plaintiff.” (Rec. 98.)

In support of his first assignment of error, counsel, in the brief of his argument, says (Rec. 12): "There are two reasons why the title of Smallwood was not affected by such proceedings: First. The judgment, or decree, in cause No. 667-A is void. Second: Even if such decree were valid, the proceedings in question were insufficient to pass Smallwood's title to Ehrlich; and Ehrlich had no title to be affected by the judicial sale had in 1910 under the execution in Cause No. 667-A." First. Was the decree of the District Court, dated December 8, 1908, foreclosing the mortgage on the land described therein, void as to the defendant, Alex. Smallwood? The statute, chapter 4, section 46, Code of Civil Procedure for Alaska, provides: "The summons published shall contain the name of the court, and the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication and the time within which the defendant is required to answer the complaint."

The summons published contained everything required by this statute. (Rec. 71.) The time within which defendant was required to appear is stated as follows: "You are hereby commanded to be and appear in the above-entitled court holden at Juneau in said Division and District, within thirty days after the completion of the period of publication of this summons. First Pub. May 2, 1908. Last Pub. June 13, 1908." It would seem that any man of average intelligence who is able to read the English language would have no difficulty in ascertaining the length of time allowed him to appear and answer

this summons. In stating that he must appear within thirty days after the completion of the period of publication and stating the date of the completion of the period of publication, it leaves no doubt in the defendant's mind that he must appear within thirty days after June 13, 1908. Counsel in his brief, page 22, says: "The summons directs the defendant to appear within thirty days from the completion of the period of publication. But what is that period? All that the summons reveals is that the order was made on April 23, 1908. But whether the period prescribed was six weeks, the minimum, or eight weeks, or three months, the recipient of the notice was left wholly in the dark." If the recipient of the notice would compute the time from May 2, 1908, to June 13, 1908, he would see some ray of light in the darkness in which counsel leaves him, and would discover the period of publication to be six weeks. If the defendant understands the time within which he must appear, it is immaterial whether he knows or is able to determine the exact *period* of time prescribed for publication. Furthermore, sec. 48 of Carter's Code of Civil Procedure for Alaska does not require the time prescribed in the order for publication to be stated except in personal service out of the District. It says: "When publication is ordered, personal service of a copy of the summons and complaint out of the District shall be equivalent to publication and deposit in the postoffice. In either case defendant shall appear and answer within thirty days after the completion of the period of publication. In case of personal service out of the District the sum-

mons shall specify *the time prescribed in the order for publication.*” The only question is: Can the words, “First Pub. May 2, 1908. Last Pub. June 13, 1908,” be considered a part of the published summons being at the foot instead of in the body of the summons? (Rec. 71.) The Supreme Court of the State of Washington decided this question in the affirmative in 1904 in the case of Williams vs. Pittock, 77 Pac. 385. Quoting from page 387: “The petition further alleges that the summons was insufficient to confer jurisdiction, for the reason that it did not set out therein the date of the first publication, and was therefore too indefinite to inform the defendants therein named, or the appellants, when they were required to appear and defend the action. Respondent argues that a tax foreclosure is a special proceeding, governed by the special revenue statutes only, and that, inasmuch as those statutes do not specifically require that the date of the first publication of the summons shall be stated, it is therefore unnecessary. Subdivision 2 of section 1, c. 178, pp. 383, 384, Sess. Laws 1901, relates to the special tax procedure, and declares that service by publication of summons may be had. There is no requirement in such summons different from those described by the general statute. We therefore think the law of 1901 requires a reference to the general statute for a description of what the summons shall contain. That statute, as found in section 4878, 2 Ballinger’s Ann. Codes & St., requires that the date of the first publication shall be named. It follows that a tax foreclosure publication summons shall state such date.

Such, in effect, was said by this Court in *Thompson vs. Robbins*, 32 Wash. 149, 72 Pac. 1043, and afterward approved in *Smith vs. White*, 32 Wash. 414, 73 Pac. 480. If it be true, therefore, that the summons in question did not disclose the date of its first publication, it was insufficient to confer jurisdiction. Immediately following the attorney's signature to the summons is the following: 'Date of First Publication, October 9th, 1902.' Appellants contend that the above words, not being in the body of the summons, are not contained therein within the meaning of the statute. They also argue that, since the words follow the signature of counsel, it does not appear that they were authorized by the plaintiff in the case; that they may have been placed there by the printer, or by someone else not representing the plaintiff, and by whose acts the plaintiff was not bound. The words were, however, in a conspicuous place, and where they must have been seen if the summons was read. It was the duty of the defendants in the action to presume that the correct date was stated, and to act accordingly. If it afterward developed that the date was incorrect, the diligence of the defendants would have saved them from any prejudicial consequences. The fact that the words followed the signature of counsel, we think, is immaterial. They conveyed as much information as if they had preceded the signature, and their location is analogous to that of the postoffice address of counsel which usually follows the signature upon the summons. In *Wagnitz vs. Ritter*, 31 Wash. 343, 71 Pac. 1035, it was held that section 4871, 2 Ballinger's Ann. Codes

& St., which contemplates that the postoffice address of the attorney shall be contained in the summons, was sufficiently complied with when such address followed the signature. It is true that section 4872 sets forth a form of summons which places the postoffice address after the signature, but the section descriptive of the summons contemplates that the statement as to the postoffice address shall be a part of the summons itself. The form section is a mere legislative construction of the meaning of the prior one to the effect that when the address follows the signature, it is sufficiently a part of the summons, and the case cited is a judicial approval of that construction. We think the essence of that construction is applicable to the subject matter here. The recital stating the date of the first publication was attached immediately at the conclusion of the summons. One could not, with ordinary care, have read the entire summons without seeing this recital, and we think it should be held to have been a part of the summons. Nothing short of a substantial departure from the statutory requirements for a summons should be held to be fatal to a proceeding under it, and, unless it is clear that a defendant has been prejudiced, the variation in form is not such substantial departure. *Shinn vs. Cummins*, 65 Cal. 97, 3 Pac. 133. To the same effect is *Ralph vs. Lomer*, 3 Wash. St. 401, 28 Pac. 760. We are unable to see that the defendants in the action were prejudiced by the form of this summons. We therefore conclude that in both particulars discussed by appellants the summons was sufficient to confer

jurisdiction." See, also, *McFarlane vs. Cornelius*, 43 Or. 513; also reported in 73 Pac. 325.

North Pacific Cycle Co. vs. Thomas, 38 Or. 307, the Court say: "The objects to be accomplished by process are to advise the defendant that an action or proceeding has been commenced against him by plaintiff, and warn him that he must appear within the time and at a place named and make such defense as he has, and in default of his so doing, that judgment will be taken against him in a sum designated or for the relief specified. If the summons actually issued accomplishes these purposes it should be held sufficient to confer jurisdiction, though it may be irregular in not containing other statements required by statute. If, on the other hand, it is wanting in these essential particulars, it will generally fail to give the Court jurisdiction. Freeman on Judgments, page 126. Judge Van Fleet in his recent very excellent work on Collateral Attack, in discussing this question, says: 'It being impossible to avoid errors, and the law having prescribed a method of correction by motion to quash or set aside the process, it would seem, on principle, that, where the process is sufficient to inform the person that a proceeding has been instituted against him in a specified tribunal, that method ought to be exclusive.' This is the rule I believe to be established by the authorities considered in section 129, *supra*. Van Fleet, Collateral Attack, section 347."

AUTHORITIES CITED BY PLAINTIFF.

Counsel for the plaintiff cites the following cases from the State of Washington:

Thompson vs. Robbins, 72 Pac. 1043.

Owen vs. Owen, 84 Pac. 606.

Baur vs. Widholm, 95 Pac. 277.

These cases require only passing notice. They all arose under the Revenue Act of the State for collection of taxes. The judgment in each case was attacked by direct proceedings, not collaterally as in the case at bar. The summons in each case was held void because it did not state what the statute required, viz., the date of the first publication. The case of Dolan vs. Jones, 79 Pac. 640, is to the same effect. I fail to see the application of these decisions to the case now before the Court, however. In perusing the decision in Dolan vs. Jones we find language that is applicable on another phase of this case as follows: "The first question raised by the respondents is that this is an action to quiet title, and, inasmuch as the appellant is not in possession and the lots are not vacant or unoccupied, the Court had no jurisdiction, and the action could not be maintained. We do not think that this is an action to quiet title, as claimed by the respondents. The reason why a person cannot maintain an action to quiet title to lands in the possession of another is that the party out of possession has a full and complete remedy in an action at law to recover possession. The appellant here had no such remedy. In an action at law to recover possession he would be concluded by the tax judg-

ment and sale, *which he could not attack collaterally*. The only remedy open to the appellant was either to move directly in the tax foreclosure case to vacate the tax judgment or to bring an independent suit in equity for that purpose. He chose the latter course, and we hold that he is properly before the court."

The case of *Odel vs. Campbell*, 9 Or. 278, might be entitled to great weight, coming, as it does, from a State which has the same statute as that of Alaska, provided the decision had any bearing upon the question now before the Court. The gist of the decision is simply to the effect that where the statute provides that the summons published shall contain the date of the order for service by publication, a summons published that did not contain such date is void.

Swift vs. Meyers, 37 Fed. 37, was decided under an entirely different state of facts than exist in the case at bar. The statute required the summons to be delivered "to some person of the family at the dwelling-house or usual place of abode of the defendant." The return stated that the summons was left with a member of the family over the age of fourteen years at his (defendant's) usual place of abode in said (Linn) county. Upon this return the Court held the service insufficient because it did not show the place was the usual place of abode in the *State*, the Court saying: "Defendant might live in Portland eleven months in the year and in Linn county one month—Portland being his usual place of abode. Still the return might be true."

Plaintiff contends that if the decree in No. 667-A was void as to Smallwood, then it was void as to

Ehrlich, the other defendant, citing Gray vs. Larimore, 4 Saw. 644. It is sufficient to answer that the decree contained a personal judgment against Ehrlich upon the notes which he had executed in favor of the plaintiff, Jenne; that there was personal service upon Ehrlich in Alaska; that he made no appearance; and that Ehrlich is not a party to this suit.

These are the only cases cited by counsel in his brief.

Plaintiff further contends that the judgment was void because there was no proof of the mailing of a copy of the summons and complaint to Smallwood on file at the time that the judgment was entered. Even if there was no such proof ever filed, it would not affect the question of jurisdiction, especially upon a collateral attack; *but* the proof *was filed* long before the plaintiff Von Arx ever obtained any interest in the property.

Cases cited by Honorable Judge Lyons in his decision (Rec. 86-92, inclusive), and Ranch vs. Werley, 152 Fed. 509; cases cited by District Judge Wolverton, page 515 of above report.

Plaintiff also complains that the affidavit showing mailing of summons to Smallwood was not filed in the original cause No. 667-A and was filed without notice to Smallwood. The affidavit *was* filed in No. 667-A. (See Rec. 80.) A perusal of the affidavit (Rec. 78, 79, 80), the journal entry of Judge Cushman's order (Rec. 76), and the order of the Court confirming the sale and overruling the objections filed by Von Arx (Rec. 56, 57), clearly shows

that Von Arx had sufficient notice of the filing and that Smallwood, although he had no personal notice, was ably represented by Von Arx and his attorney, J. G. Heid. But that is not all. The record further shows that the plaintiff in this suit in 1910 filed a suit for an injunction against J. M. Jenne, D. A. Sutherland, and A. J. Boone to restrain them from selling this property under the execution against Ehrlich; that the relief was denied and that the decision was in favor of defendants. (Rec. 76.)

The record would now disclose the entire proceedings in cause No. 781-A, Von Arx vs. Jenne et al., were it not for the objections raised by Mr. Cobb and the ruling of the Court in the trial of the case at bar. (Rec. 81.)

The plaintiff Von Arx had *his* day in court long before he commenced this action. He was the plaintiff in cause No. 781-A and he procured the quitclaim deed from Smallwood July 18, 1910, nearly three months after the decision against him by Honorable Judge Cushman, April 30, 1910, and with full knowledge of the filing of the affidavit about which he now complains. (Rec. 76.)

We come now to plaintiff's second objection, page 23 of his Brief: "But even if the judgment in Cause No. 667-A is not void, the proceedings had thereunder did not divest the title of Alexander Smallwood, and the plaintiff having a deed from him was entitled to an instruction to the jury to find for him." It would seem that this objection has been fully answered by Honorable Judge Lyons. (Rec. 92, 93.) However, in case the Court should con-

clude to consider the matter, I refer to the decree of foreclosure (Rec. 37), from which it appears: "Fourth. That the defendants, Edward Ehrlich and Alex. Smallwood, and each of them, and all other persons whomsoever having or claiming any interest in or lien upon any of the property conveyed by the mortgages herein mentioned, or either of them, subsequent to the making and filing of said mortgages, are hereby forever barred and foreclosed of any right, title or interest in said property or any part thereof," and to the deeds from U. S. Marshal to Ehrlich (Rec. 39-46), which show the sale under the first execution and delivery of the certificates of purchase to George Meyers and L. A. Slane, respectively, conveying the property to them. Can counsel seriously contend that the purchasers at said sale under the foreclosure decree did not obtain the title of both Ehrlich and Smallwood by virtue of their certificates of purchase? If they did not, then Smallwood or the plaintiff Von Arx could now maintain an action of ejectment against the purchasers, provided the property had not been redeemed by Ehrlich. Whether Ehrlich had any right to redeem or not, the fact is he did redeem, and thereby, as stated by the Honorable Judge Lyons, he took whatever title was held by the purchasers at the sale under the foreclosure decree, and the action of Ehrlich cannot redound to the benefit of the plaintiff in this case. If Edward Ehrlich, Alex. Smallwood and the plaintiff Von Arx, in their conspiracy to defeat justice and avoid the payment of the notes and mortgages given by Ehrlich in 1902, and which

Smallwood assumed and agreed to pay (Rec. 19, bottom, deed from Ehrlich to Smallwood), had put up the money and redeemed this property in the name of the absconding debtor Smallwood, then their success would have been assured. But, instead of taking that course, it was redeemed by Ehrlich, against whom the mortgagee had a personal judgment. The moment that Ehrlich took the property in his name, the lien of the judgment attached thereto, the same as it would have attached against any other property owned by Ehrlich in the District of Alaska.

The Supreme Court of Oregon has construed the statutes of that State relative to foreclosure of mortgages, redemption, etc., in the following cases:

Settlemyre vs. Newsome, 10 Or. 446.

Willis vs. Miller, 31 Pac. 827.

Flanders vs. Aumack, 51 Pac. 447.

Williams vs. Wilson, 70 Pac. 1031.

Kaston vs. Storey, 80 Pac. 217.

Jacobson vs. Lassas, 90 Pac. 904.

The statutes of Oregon concerning the foreclosure of real estate liens are identical with those of Alaska.

THE PLAINTIFF IS NOT ENTITLED TO RECOVER IN THIS ACTION IN ANY EVENT, because

FIRST. The complaint fails to state facts sufficient to constitute a cause of action under chapter 32, secs. 301 and 303, Code of Civil Procedure for Alaska. The statute provides, sec. 301: "Any person who has a legal estate in real property, and a present right to the possession thereof, may recover

such possession, with damages for withholding the same, by an action.” Sec. 303: “The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage in such sum as may be therein claimed. The property shall be described with such certainty as to enable the possession thereof to be delivered if recovery be had.” The complaint does not show a legal estate in land in the plaintiff; it does not state the nature of plaintiff’s estate in the land; and the property is not described with such certainty as to enable the possession thereof to be delivered if a recovery be had.

SECOND. Even if the complaint states a cause of action, plaintiff failed to make out a case because he did not prove prior possession either in himself or his grantors.

THIRD. Even though the testimony is sufficient to show prior possession in his grantor, that is not sufficient against defendant A. J. Boone, who was in peaceable possession under color and claim of title.

ARGUMENT.

FIRST. The only allegation in the complaint (Rec. 1) as to the nature of plaintiff’s title is, “That the plaintiff and defendant both claim said property under a common source of title, to wit, one Edward Ehrlich.” This is not sufficient, when we consider that the land sought to be recovered is the bed of

the sea, tide land on Gastineaux Channel in the Territory of Alaska. The Court will take judicial notice of the fact that Gastineaux Channel is an arm of the sea and navigable water. All the other facts as to the kind of land are alleged in the complaint and admitted in the answer.

In the first place, plaintiff does not allege that Edward Ehrlich ever had title to this tide land, and, in the second place, the laws of the Territory provide expressly that the title to all tide lands located on the shore of navigable water in Alaska is reserved by the United States for the future State that may be carved out of the Territory. See Act May 14, 1898, Sec. 2, entitled, "An Act Extending the Homestead Laws and Providing for Right of Way for Railroads in the District of Alaska and for Other Purposes." 30 Stat. at L. 409, which provides, "That nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said District, or any part thereof, to tide lands and beds of any navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District."

No citizen of the United States can obtain title to such lands in Alaska. Any person who is in possession of such lands is a trespasser against the Gov-

ernment of the United States. *Russian American Packing Co. vs. United States*, 199 U. S. 570, 50:314.

Furthermore, when any person who happens to be in possession of such lands abandons his possession and leaves the country and takes up his residence in a foreign country, he cannot afterward, by quitclaim deed, convey a legal estate in such tide lands as will be sufficient in law upon which to base an action of ejectment.

SECOND. Plaintiff fails to show possession in himself or his grantors (the Court will note Record, page 4, that defendant pleads the nature of his own title as follows: "First, Actual possession prior to and at commencement of this action"), and the proof shows that defendant was in possession at the commencement of the action and for eighteen months prior thereto. See testimony of defendant Boone (Rec. 61). The only evidence introduced by plaintiff to show possession was his own testimony. (Rec. 31, 32.) The cross-examination shows clearly that Von Arx did not know whether Ehrlich ever had actual possession of this property or not. I quote from his testimony:

"Q. You don't know—you are not sure about it, whether the building was built or not?

"A. I can't tell, but should after building connect; they—it is not connected; therefore I don't know, but I believe it was built. That is all."

No one would seriously contend that a person can be in possession of land beneath the ebb and flow of the tide without having some sort of a building on it; and this witness frankly admits that he doesn't

know whether there was a building on the land or not.

THIRD. Even though the proof was sufficient to show possession in Ehrlich in 1905, plaintiff would not be entitled to recover as against the defendant Boone, who was in peaceable possession of the property, because plaintiff has failed to prove any ouster by defendant.

Prior possession is sufficient only as against a mere intruder or wrongdoer.

Board of Regents of University of Arizona vs.
Charlebois, 36 Pac. 32.

Sabariego vs. Maverick, 124 U. S. 261, 31 :430.

The defendant being a purchaser in good faith for a valid consideration, and in possession of the property, and plaintiff having failed to show a better right thereto, the judgment of the District Court should be affirmed.

Respectfully submitted,

Z. R. CHENEY,
Attorney for Defendant in Error.

S. J. L.

No. 2017.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

VICTOR VON ARX,

Plaintiff in Error,

VS.

A. J. BOONE,

Defendant in Error.

Petition of Plaintiff in Error for a Rehearing

**Upon Writ of Error to the United States District
Court for the District of Alaska, Division No. 1**

J. H. COBB,

Attorney for Plaintiff in Error.

No. 2017.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR VON ARX,

Plaintiff in Error,

VS.

A. J. BOONE,

Defendant in Error.

PETITION FOR REHEARING

After a careful examination of the opinion of this Honorable Court in this case, we have concluded to ask for a rehearing. We believe we may with perfect propriety do this in view of the fact that the point we wish to emphasize was not exhaustively presented in the brief, and seems to have been overlooked, at least as to its full force and effect, in the opinion. And if this is the case, and the Court has thereby been misled, or inadvertently fallen into error, we are satisfied Your Honors would be unwilling to spare any labor and pains to correct such error in the conclusions reached.

Your Honors have thus tersely and correctly stated the position of the plaintiff:

“As the plaintiff could recover in ejectment only upon proof of title or right of possession in

him, it was incumbent upon him to show not only that he received a conveyance from Smallwood, but that at the date of such conveyance, Smallwood's interest in the property had not been divested by the decree of foreclosure rendered against him on December 8, 1908, and the proceedings following thereupon."

The Court then proceeds to dispose of the plaintiff's contention that the decree of December 8, 1908, was void; and of this portion of the opinion we do not ask a reconsideration. The Court then said:

"We are not called upon to decide whether Erhlich had the right to redeem the property after the sale to Meyer, or what may have been the effect of the redemption. By the foreclosure sale Smallwood's interest was sold to Meyer, and if there was no valid redemption, the certificate of purchase which Meyer received from the marshal was sufficient evidence in the action of ejectment, to show that Smallwood had been divested of his interest."

The decision of the case, then, upon this branch of the controversy, rests upon the proposition that Smallwood's title had been divested out of him by the decree and proceedings under it, at the date of the conveyance to the plaintiff. If this be true, then we most respectfully submit that the Court must have overlooked the theory of the defense as made by the pleadings, and certain facts appearing in the evidence, and certain legal principles applicable thereto. For convenience and clearness we will briefly restate these matters:

1st. The defendant plead the deeds from the marshal

to Erhlich dated March 10th, 1910. (Rec. 5.) These deeds are in the record pages 39 to 46, and show that on March 2, 1910, the amount of the bids for the property under the sale theretofore had, was repaid by Erhlich, and a certificate of redemption given to him. They further show that the redemptionees were Meyer and *the defendant A. J. Boone*. Plaintiff in his reply admitted this, but denied only that Erhlich thereby obtained the title of Smallwood. (Rec. 9.) *Thus the case proceeded upon the theory that the title acquired by the sale under which Meyer and Slane (defendant's assignor) bought had been terminated by the redemption therefrom. It was an admitted fact in the case that the certificate of purchase from the marshal to Meyer was functus officio and never became merged or ripened into title.*

2nd. It is shown by the evidence, and is conceded, that on December 8, 1908, at the date of the rendition of the decree in cause No. 667A, the title, or right of possession of the property in controversy, was in Smallwood.

3rd. That decree as against Smallwood is one *in rem* only, and does not purport to be a judgment *in personam* against him.

4th. At the sale under the order of sale issued against the property, Meyer became the purchaser of a portion thereof, and one L. A. Slane of the balance, and Slane subsequently assigned his certificate of purchase to the defendant Boone. (Rec. 39-46.)

5th. On March 2, 1909, and within 12 months of the confirmation of the sale, Erhlich paid the amount

of the purchase money with interest, for Meyer and Boone, and Boone pleads and relies upon this redemption.

6th. At that time Erhlich was the agent and attorney-in-fact for Smallwood, but had no other interest whatever in the property. (Rec. 23-25.)

7th. The marshal executed deeds to Erhlich to Smallwood's property. (Rec. 39-46.)

8th. Thereafter, upon execution against Erhlich alone, the property was sold as the property of Erhlich, and bid in by the defendant Boone. (Rec. 53-4.)

9th. Thereafter Smallwood, by his agent Erhlich, sold and conveyed to the plaintiff. (Rec. 27-8.)

Upon the above stated pleadings and facts, it was contended by the defendant that while the sale to Meyer and Slane was terminated by the redemption, yet the title did not revert to, or remain in Smallwood, but by virtue of the marshal's deeds Smallwood's title passed directly to Erhlich, and thence by execution sale against Erhlich to the defendant.

The plaintiff contended that the effect of the redemption was to put an end to the sale, and the title remained in Smallwood, and was by him conveyed to the plaintiff.

Your Honors held this issue to be immaterial in as much as the marshal's certificate to Meyer *after redemption*, was sufficient evidence that Smallwood had been divested of title at the time of his conveyance to the plaintiff. And we earnestly ask your Honors to re-examine this holding in the light of the following authorities:

First: When Meyer and Slane (Boone) bid in the property at the foreclosure sale, they did not thereby obtain the title of Smallwood. A successful bidder at such sale only obtains the right of possession and a right to a deed and the title at the termination of the period of redemption, *if there is no redemption*. In the meantime the title remains in the defendant in execution subject only to be divested out of him by the execution of the marshal's deed if there is no redemption.

Cartwright vs. Savage, 5 Or. 398.

In that case the Court, speaking of the successful bidder at sheriff's sale, said:

"He has no absolute legal right in and to the premises until the confirmation of the sale and the execution of a deed by the sheriff. It is well settled that if redemption be consummated, the effect of the sale is terminated, and the property is restored to its original condition."

To the same effect is,

Dray vs. Dray, 21 Or. 59;

Settemire vs. Newsome, 10 Or. 446;

Kaston vs. Storey, 80 Pac. Rep. 217;

Williams vs. Wilson, 70 Pac. Rep. 1031.

Second: Erhlich, being neither a judgment creditor, nor defendant in execution, had no right of redemption. But when he paid the redemption money to redeem, and this attempted redemption was acquiesced in by Meyer and Boone, they lost all interest in the property, and were estopped to say there was no

redemption. Acquiescence by the purchaser in a redemption by one having no legal right to redeem, terminates the effect of the sale as fully as a legal redemption would have done, and has the same effect, viz.: "*the property is restored to its original condition.*"

II Freeman on Ex., 2nd ed., sec. 314a;
Borders vs. Murphy, 78 Ill. 81;
Clingman vs. Hopkie, 78 Ill. 152;
Meyer vs. Montonye, 106 Ill. 414;
Brooks vs. Sanders, 110 Ill. 453;
Smith vs. Mace, 137 Ill. 68, S. C. 26 N. E. Rep.
 1092.

In *Smith vs. Mace* the Supreme Court of Illinois, citing the four preceding cases, said:

"The doctrine of these decisions is simply this: A party accepting money as a redemption of property from a sale is thereafter estopped from saying that the property is not redeemed. Being redeemed from the sale, the property is no longer incumbered by it, *and it ceases to be an element in the title to the property.* Redemption by junior judgment creditors are purely statutory, *and no one can obtain rights in that way, save by bringing himself within the spirit of the statute.* These parties having failed to do so, they could assert no claim to the property, *and the defendants were therefore left with their property just as if these liens had never existed.*" (Italics ours.)

In the case at bar, the defendant, one of the redemptionees, pleads and relies upon the redemption by Erhlich. Yet if the authorities above quoted are good law, when Erhlich redeemed he acquired no

right to the property as against Smallwood, because he was not "within the spirit of the statute" conferring the right of redemption. But the defendant is estopped to deny that the property was redeemed, and "restored to its original condition." The sale to Meyer then, which your Honors held to be conclusive against plaintiff, "*ceased to be an element in the title to the property.*" Erhlich did not and could not obtain any right in and to the property by the redemption, because he had no right of redemption, but the redemption nevertheless, having put an end to the sale, the title remained in Smallwood, and of course the defendant got nothing by his purchase under the personal judgment against Erhlich, for Erhlich had nothing to sell. The marshal's deeds were void for lack of legal power to execute them. Such deeds must be made to the purchaser or his assignee, and not to a volunteer.

This reasoning, and the conclusions reached, appears to us to be inevitably correct in the light of the adjudged cases; and if it is, then it necessarily follows that this Court was in error in holding that it "was not called upon to decide whether Erhlich had the right to redeem the property"; and was also in error in holding that "the certificate of purchase which Meyer received from the marshal was sufficient evidence in the action of ejectment to show that Smallwood had been divested of his interest." That would have been the case, undoubtedly, if the effect of the sale and the certificate had not been put an end to by the redemption. But manifestly the purchaser can-

not have his money back and the property too. These matters the Court appears to have overlooked, and we think that a proper consideration of them will lead to the conclusion that the case ought to have been differently decided.

Third: There is another aspect of the case to which we most respectfully call the Court's attention. At all the times mentioned in the pleadings Erhlich was the agent of Smallwood. He could acquire no rights in the property adverse to Smallwood or his vendee. The payment of the redemption money by Erhlich was in law the payment by Smallwood.

1 Am. & Eng. Ency. of Law, 2nd ed., 1082-1085,
and cases cited.

This is the rule even if Erhlich were claiming the property as against Smallwood or his vendee. But the facts lead irresistibly to the conclusion that Erhlich was in fact as well as in law making the redemption for Smallwood; for he thereafter as agent of Smallwood sold and conveyed the property as the property of Smallwood. The execution of the so-called marshal's deeds to Erhlich was simply the marshal's or somebody's blunder. His only power, and his official duty, was to have issued a certificate of redemption to Smallwood, the only person who had the right of redemption. But certainly Smallwood cannot lose his property because the marshal did an unauthorized act, whether that act was the result of a blunder or not.

Believing that a mistake has been made, and a consequent injustice done the plaintiff in error, we most

earnestly beg that Your Honors will grant a rehearing upon the questions raised.

Respectfully submitted,

J. H. COBB,
Attorney for Plaintiff in Error.

I, J. H. Cobb, counsel for Plaintiff in Error, do hereby certify that in my judgment the foregoing petition is well founded and is not interposed for delay.

J. H. COBB,
Counsel for Plaintiff in Error.

Service of the above and foregoing motion admitted this March 13, 1912.

Z. R. CHENEY,
Attorney for Defendant in Error.

No. 2019

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
JOSEPH JOURDEN,
Defendant in Error.

TRANSCRIPT OF RECORD.

**Upon Writ of Error to the United States District
Court for the District of Alaska,
Second Division.**

No. 2019

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

JOSEPH JOURDEN,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District
Court for the District of Alaska,
Second Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of] Attorneys of Record.

B. S. RODEY, U. S. Attorney, Nome, Alaska,
N. H. CASTLE, Assistant U. S. Attorney, Nome,
Alaska,

Attorneys for Plaintiff.

ELWOOD BRUNER, Nome, Alaska,
J. ALLISON BRUNER, Nome, Alaska,
GEO. B. GRIGSBY, Nome Alaska,
Attorneys for Defendant.

*In the District Court, District of Alaska, Second
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

Summons [In Case No. 2259].

The President of the United States of America, to
Joseph Jourden, Greeting:

You are hereby summoned and required to appear
and answer the complaint of the plaintiff on file in
the office of the Clerk of said Court, at the city of
Nome in said District, within thirty days from the
service of this Summons upon you, or judgment for
want thereof will be taken against you; and you are
hereby notified that if you fail to answer the said
complaint the plaintiff will take judgment against
you for the sum of two thousand dollars and for costs.

Witness, the Honorable CORNELIUS D.
MURANE, Judge of the said District Court, and the
seal of the said Court hereto affixed, this twenty-

fourth day of February, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-fifth.

[Court Seal]

JOHN SUNDBACK,

Clerk of the District Court, District of Alaska, 2nd Division.

By T. M. Reed,
Deputy Clerk.

United States Marshal's Office,
District of Alaska, 2d Division,—ss.

I hereby certify that I received the within Summons on the 24th day of February, 1911, and thereafter, on the 24th day of February, 1911, I served the same at Nome, Alaska, by delivering to and leaving with Joseph Jourden a copy thereof, together with a certified copy of the Complaint filed herein.

Returned this 25th day of February, 1911.

T. C. POWELL,

U. S. Marshal.

By H. H. Darrah,
Deputy.

MARSHAL'S COSTS.

1 Service.....\$6.00

[Endorsed]: Cause No. 2259. District Court, District of Alaska, Second Division. United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Summons. *R*Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Mar. 10, 1911. John Sundback, Clerk. By———, Deputy.

*District Court for the District of Alaska, Second
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

Complaint [In Case No. 2259].

Now comes plaintiff above named and complaining of said defendant for cause of action alleges as follows:

1.

That between the first day of November, 1909, and the first day of November, 1910, said defendant conducted a barroom and retail liquor business in the city of Nome, District of Alaska, under and by virtue of a barroom and retail liquor license issued by the District Court for the District of Alaska to said defendant on the first day of November, 1909.

2.

That during the said period, to wit, from November the first, 1909, to November the first, 1910, there were within and under the jurisdiction of the above entitled court other dealers conducting barroom and retail liquor businesses under licenses granted by said court, similar to that granted as aforesaid to this defendant, and that during said period this defendant sold, furnished and delivered to many of said other dealers last above described large quantities, being all of certain kinds of distilled, malt and fermented liquors, in which they dealt, and during said period continued to maintain and keep on hand and in warehouses for such purpose a large stock

of said distilled, malt and fermented liquors, largely in excess of the ordinary requirements of his own said barroom and retail liquor business.

3.

That under the said barroom and retail liquor license so granted and obtained as aforesaid in paragraph 1 of this complaint, and in addition thereto, said defendant deliberately, intentionally, knowingly, and in fact did and conducted the business of a wholesale dealer in distilled, malt and fermented liquors in this, that during said period he sold, delivered and furnished to said other retail liquor dealers, and to other customers, distilled, malt and fermented liquors in large quantities and greatly in excess of the maximum of five gallons as limited by said retail liquor license.

4.

That the said defendant during the said period conducted his said wholesale business in the following manner, to wit, by continuously, knowingly and with intent as aforesaid, delivering to one and the same person often on one and the same day, and frequently several times on the same day, and at intervals so close together as to constitute in truth and in fact a single sale to such customers, quantities of distilled, malt and fermented liquors that aggregated in the amount so sold and delivered to each of said customers a quantity largely in excess of five gallons, falsely and knowingly claiming and pretending each such so called sale and delivery to be a sale of five gallons or under, and thus seeking and pretending by such attempted segregation to keep within the limitation of five gallons at a single sale, and while

so furnishing said commodities in wholesale quantities, by said subterfuge was so attempting and intending to avoid the payment of a wholesale liquor license.

5.

That said defendant during all of the said period failed, neglected and refused to apply for or to secure a wholesale liquor license as required by Sec. 468 of the Code of Criminal Procedure of the District of Alaska, and the amendments thereto, contained at page 602 of Vol. 35 of the U. S. Statutes at Large, and further, said defendant notwithstanding that he had been so conducting during said period a wholesale liquor business, failed, neglected and refused, and now still refuses, to pay the sum so due to plaintiff as a wholesale liquor license for conducting the said business from November the first, 1909, to November the first, 1910, though demand has been frequently made therefor.

6.

That there is now due and owing to the United States of America the sum of Two Thousand Dollars for the doing and conducting of said wholesale liquor business by said defendant during the said period, and no part whereof has been paid.

WHEREFORE: Plaintiff demands judgment against said defendant for the said sum of Two Thousand Dollars and for the costs in this behalf expended.

B. S. RODEY,
U. S. Attorney.

United States of America,
District of Alaska,—ss.

B. S. Rodey, being first duly sworn, deposes and

says: "I have read the foregoing complaint and know the contents thereof and verily believe the same to be true. I make this verification because the United States of America is the party plaintiff and I am its officer."

B. S. RODEY,

Subscribed and sworn to before me this 24th day of February, 1911.

[Notarial Seal] NEVILLE H. CASTLE,
Notary Public in and for the District of Alaska.

[Endorsed]: No. 2259. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Complaint. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Feb. 24, 1911. John Sundback, Clerk. By———, Deputy. B. S. Rodey, U. S. Attorney, Attorney for Plaintiff.

*In the District Court for the District of Alaska,
Second Division.*

No. 2259.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JOSEPH JOURDEN,
Defendant.

Demurrer [in Case No. 2259].

Comes now the defendant in the above-entitled action, and demurs to the complaint of the plaintiff filed herein on the following grounds.

1.

That the Court has no jurisdiction of the subject of the action.

2.

That the complaint does not state facts sufficient to constitute a cause of action.

ELWOOD BRUNER,
J. ALLISON BRUNER,
GEORGE B. GRIGSBY,
Attorneys for Defendant.

I hereby acknowledge the service of the Demurrer by receipt of copy this 22 day of March, 1911.

N. H. CASTLE,
Asst. Attorney for Plaintiff.

[Endorsed]: No. 2259. In the United States District Court, District of Alaska, Second Division. United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Demurrer. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Mar. 22, 1911. R. John Sundback, Clerk. By ———, Deputy. Elwood Bruner, J. Allison Bruner, Geo. B. Grigsby, Defendant's Atty. Nome, Alaska.

[Minutes—April 22, 1911—Re Filing of Opinion.]
In the District Court for the District of Alaska,
Second Division.

Term minutes, General, 1911, Term, beginning February 1, 1911.

Saturday, April 22, 1911, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court the following proceedings were had:

2259.

UNITED STATES,

vs.

JOSEPH JOURDEN.

2260.

UNITED STATES,

vs.

JOSEPH JOURDEN.

The Court handed down an opinion herein sustaining the demurrer in each of these cases.

Opinion filed.

*In the District Court for the District of Alaska,
Second Division.*

No. 2260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

Opinion.

This cause came before the Court on demurrer to the complaint.

B. S. RODEY, U. S. Attorney, and N. H. CASTLE, Assistant U. S. Attorney, Appearing for the Government.

ELWOOD BRUNER, J. ALLISON BRUNER and GEO. B. GRIGSBY, Appearing for the Defendant.

The Government through its officers brought two civil actions for two thousand dollars in each case,

alleging said amounts to be due from the defendant as a license fee for having conducted a wholesale liquor business in the municipality of Nome, Second Division of the District of Alaska. The same questions are involved in both cases and they were argued and submitted together.

The complaint filed by the Government is as follows:

“That said defendant is now conducting a barroom and retail liquor business in the city of Nome, District of Alaska, under and by virtue of a barroom and retail liquor license issued by the District Court for the District of Alaska on the first day of November, 1910.

“That there are now and have been during all of the times mentioned in said complaint, within and under the jurisdiction of the above-entitled court, other dealers conducting barroom and retail liquor businesses under licenses granted by said court, similar to that granted to this defendant, and that this defendant has been since the first day of November, 1910, and is now selling, furnishing and delivering to many of said other dealers last above described large quantities, being all of certain kinds of distilled, malt and fermented liquors in which they deal, and during said period, has been and is now maintaining and keeping on hand and in warehouses for such purpose a large stock of said distilled, malt and fermented liquors, largely in excess of the ordinary requirements of his own said barroom and retail liquor business.

“That under the said barroom and retail liquor license so granted and obtained as aforesaid in para-

graph 1 of this complaint, and in addition thereto, said defendant has been and is deliberately, intentionally and knowingly, now in fact doing and conducting the business of a wholesale dealer in distilled, malt and fermented liquors, in this, that he is selling, delivering and furnishing to said other retail liquor dealers and to other customers distilled, malt and fermented liquors in large quantities and greatly in excess of the maximum of five gallons as limited by his said retail liquor license.

“That said defendant has been and is now conducting his said wholesale business in the following manner, to wit, by continuously, knowingly and with intent as aforesaid, delivering to one and the same person often on one and the same day, and frequently several times on the same day, and at intervals so close together as to constitute in truth and in fact a single sale to such customers, quantities of distilled, malt and fermented liquors that aggregate in the amount so sold and delivered to each of said customers a quantity largely in excess of five gallons, falsely and knowingly claiming and pretending that each such so called sale and delivery is a sale of five gallons or under, and thus seeking and pretending by such attempted segregation to keep within the limitation of five gallons at a single sale, and while so furnishing said commodities in wholesale quantities, by said subterfuge is so attempting and intending to avoid the payment of a wholesale liquor license.

“That said defendant during all of the said period has failed, neglected and refused and now still refuses to apply for or to secure a wholesale liquor license as required by Sec. 468 of the Code of Crim-

inal Procedure of the District of Alaska and the amendments thereto, contained at page 602 of Vol. 35 of the U. S. Statutes at Large, and further, said defendant notwithstanding he has been and is so conducting a wholesale liquor business, has failed, neglected and refused and now still refuses to pay the sum so due to plaintiff as a wholesale liquor license for conducting the said business, though demand has been frequently made therefor.”

To this complaint the defendant has in each case interposed a demurrer. The demurrer sets up—

1. That the Court has no jurisdiction of the subject of the action;

2. That the complaint does not state facts sufficient to constitute a cause of action.

Both grounds of the demurrer raise an issue as to whether the Government can by civil suit collect the license fee of two thousand dollars where it appears that a person has violated Sec. 468 of Carter's Code of Alaska, Act March 3, 1899, as amended by Act Feb. 6, 1909.

Counsel for the Government very earnestly contend that this is a proper and permissible remedy and cite numerous authorities which they maintain support this contention. In order to better understand the contentions of the respective parties and to be able to apply the authorities we should constantly bear in mind the wording of our statute, Sec. 472 of the Criminal Code of Alaska, which is as follows:

“PENALTY FOR SELLING LIQUORS WITHOUT LICENSE. That anyone engaging in the sale of intoxicating liquors, as specified in this Act, in the District of Alaska, who is required by it

to have a license as herein specified, without first having obtained a license to do so as herein provided, or any person who shall engage in such sale in any portion of the District where the sale thereof is prohibited, upon conviction thereof shall be fined not less than one hundred dollars nor more than two thousand dollars, or be imprisoned for not less than one month nor more than one year; and upon every subsequent conviction of a like offense shall, in addition to the penalty above named, be imprisoned not less than two months nor more than one year."

The phrases "upon conviction thereof shall be fined"—"or be imprisoned," are of controlling importance in construing this Act.

Sec. 474 of said license Act, Carter's Code of Criminal Procedure, under the Title "Procedure," reads as follows:

"That prosecutions for violations of the provisions of this Act shall be on information filed in the district court or any subdivision thereof, or before a United States Commissioner, by the United States marshal or any deputy marshal, or by the district attorney or by any of his assistants. Or such prosecution may be by and through indictment by grand jury, and it shall be the duty of either of said officers, on the representation of two or more reputable citizens, to file such information, or to present the facts alleged to constitute violations of the law to the grand jury."

The title of the Act of March 3, 1899, is in the following language:

"An Act to define and punish crimes in the District of Alaska, and to provide a Code of Criminal

Procedure for said District.”

In a very recent case which went to the Circuit Court of Appeals from this Division entitled *John J. Sesnon Company vs. the United States*, reported in 182 Fed. Rep. at page 576, the Court says:

“When doubt exists as to the meaning of the statute the title may be looked to for aid in its construction.”

Counsel for the Government in their brief and argument have evidently overlooked the difference in the wording of Sec. 3242 U. S. Revised Statutes, and the Alaska License Act of 1899 as amended by the Act of 1909. The Revised Statutes provided that any person who carries on the business of such dealer without having paid the tax shall be *liable for the tax* and also a fine of not less than ten nor more than five hundred dollars; while the Alaska Code only provides for a fine or imprisonment, clearly indicating in the latter case that only a criminal action is contemplated by the Code. Where that is the case the rule is well settled that no civil action will lie.

The Supreme Court of the United States in passing upon a statute which is to all intents identical with ours laid this down as a settled rule in the case of the *United States vs. Claflin*, 97 U. S. 546.

In the case of *Ex parte Howe*, reported in 26 Oregon 184, in construing a statute having the words “conviction” and “Punishment,” appears the following pertinent language:

“The terms ‘conviction’ and ‘punishment’ each have a well settled legal meaning and are used in the law to designate certain stages and incidents of a criminal prosecution, and when the legislature de-

clared that for a violation of his official duty a county treasurer should, on conviction thereof, be punished, it manifestly intended that the proceedings against him should be on the criminal not the civil, side of the court."

To the same effect is the language of the Ency. Pl. & Pr., vol. 16 at page 234, where the author says:

"With reference to penal actions the word 'penalty' means a forfeiture inflicted by penal statute; the word 'fine' a sum of money imposed by a criminal law. The use of these and other technical words and phrases will frequently determine the form of the action as respectively civil or criminal."

In the case of the State of Iowa vs. Chicago B. & Q. R. Co., 37 Fed. Rep. 498, is contained a quotation from Blackstone drawing a distinction between crimes and misdemeanors and civil injuries, in which it is said that "crimes and misdemeanors are a breach in violation of public rights and duties due to the whole community, considered as a community, in its social aggregate capacity," which brings to the mind of the court that the License Act of Alaska is not alone for the benefit of the United States Government but that a community in Alaska has an interest in the question whether a license shall be granted or not, and the Act protects that right by requiring the party applying for a license to secure the consent of a majority of the inhabitants before the license can issue. If the Government could permit a person to violate the law and permit such person to conduct the business of wholesaling or retailing without first securing the license as required, and after the time had expired could sue and recover the amount of the li-

cense this provision of the law could be defeated and the citizens compelled to tolerate the existence of a barroom or wholesale house within its midst and against the wish of a majority of the inhabitants.

The word "information" as used in the Act is defined by Sec. 270, page 91, of Carter's Code, and clearly shows that it is used in a criminal sense.

Where the statute provides the right and the remedy, only the statutory remedy can be followed.

People vs. Croycroft, 2 Cal. 243.

Reed vs. O. R. R. Co., 33 Cal. 212.

In the case of *Reed vs. O. R. R. Co.*, *supra*, Judge Shafter uses the following quotation from Chief Justice Shaw:

"Where a statute gives a new right and prescribes a particular remedy for its recovery, such remedy must be strictly pursued, though it is otherwise where a statute gives a right without prescribing a remedy. In the latter case the common law affords the remedy and any suitable form of action may be adopted."

Many of the authorities cited by counsel for the Government are based either upon statutes creating a penalty or forfeiture without prescribing the remedy, and several of them are upon statutes which provide for a penalty, forfeiture or fine and prescribe a civil remedy, or both a civil and criminal remedy.

For instance, one of the cases relied upon and from which counsel quote is the *State of Idaho vs. Wall*, 109 Pac. Rep. 724. If counsel had quoted the statute, which is set forth in the opinion, in addition to the extract from the opinion, it would have been of

much more assistance to the court.

A portion of the Idaho statute reads as follows:

“The collector may direct suit in the name of the State of Idaho as plaintiff to be brought for the recovery of license tax and in such case either the collector or prosecuting attorney may make the necessary affidavit for a writ of attachment, which may issue without bond being given on behalf of the plaintiff. In case of a recovery by the plaintiff twenty dollars damages must be included in the judgment and costs to be collected from the defendant etc.”

The case of *United States vs. Ebner*, reported in 25 Fed. Cases, No. 15,020, seems to lay down the proper rule to be followed as to the remedy to be pursued under different statutes. The court says:

“And for our future guidance in relation to the violations of the internal revenue act, I venture to lay down the following rules:

1. Where the punishment prescribed is a pecuniary penalty or fine only, and where the act fixes the exact amount of it, the action of debt will lie to recover it.

2. Where the punishment provided is a fine only, and the exact amount of it is not fixed by the act, but is left to the discretion of the court trying the case,—as where the language is that the party shall be fined in any sum not exceeding a certain amount,—there the action of debt will not lie, nor can any other civil action be the ‘appropriate’ remedy, but the prosecution must be by indictment.

3. In all cases in which the act provides that imprisonment may or must be a part of the punishment,

there no civil action will lie, and the only remedy is by indictment.”

Our statute falls within both of the last divisions quoted and counsel for the Government have cited no authority which holds that a civil action can be maintained under a statute of that character. It will be noted that our statute does not declare a forfeiture of the license fee of two thousand dollars and that it may be collected by an appropriate remedy, but simply imposes a penalty for the violation of the law by way of a fine or imprisonment.

In further support of the proposition that a proceeding by information or indictment is the only remedy under our Code the court wishes to call the attention of counsel to the case of *State vs. Marshall*, reported in 15 Atl. Rep. 210 (Supreme Court of N. H.); also 23 CYC. 212 (d).

The court has examined numerous other cases which support this position but deems it unnecessary to cite further authority upon this branch of the case.

The other phase of the law which was argued to some extent by counsel for the defendant and to which the attorneys for the Government devoted but little time, the court deems it unnecessary to pass upon as the matter already considered disposes of the case; but in view of the fact that the matter may possibly come before the court in another form when counsel will undoubtedly present a full argument upon authority I will simply direct the attention of counsel on both sides to the following authorities

which I have noted in my examination into the question passed upon.

U. S. vs. Clair, 2 Fed. Rep. 57.

U. S. vs. Giller, 54 Fed. Rep. 659.

People vs. Charbineau, 22 N. E. 271.

The demurrers in each case are sustained.

CORNELIUS D. MURANE,

District Judge.

[Endorsed]: No. 2259. (2260.) In the District Court for the District of Alaska, Second Division. The United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Opinion. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 22, 1911. John Sundback, Clerk. By _____, Deputy.

**[Stipulation Re Plaintiff's Election to Amend or
Stand upon Complaint, etc., in Case No. 2259.]**

*In the District Court for the District of Alaska,
Second Division.*

#2259.

UNITED STATES OF AMERICA

vs.

JOSEPH JOURDEN.

It is hereby stipulated and agreed between the counsel for the plaintiff and defendant above named that plaintiff have ninety (90) days from date within which to elect as to whether it will amend or stand upon the complaint as herein filed, or take such other

action in the premises as to it may seem expedient.

Dated at Nome, Alaska, this 22d day of April, 1911.

N. H. CASTLE,

Asst. U. S. Attorney.

ELWOOD BRUNER,

J. ALLISON BRUNER,

GEO. B. GRIGSBY,

Attorneys for Defendant.

[Endorsed]: No. 2259. In the District Court for the District of Alaska, Second Division. United States of America vs. Joseph Jourden. Stipulation. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 22, 1911. John Sundback, Clerk. By ———, Deputy. R.

[Minutes—July 8, 1911—Re Dismissal of Action No. 2259 and Plaintiff's Election to Stand on Complaint in Case No. 2260.]

*In the District Court for the District of Alaska,
Second Division.*

Term Minutes, General, 1911, Term, beginning February 1, 1911.

Saturday, July 8, 1911, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court the following proceedings were had:

2259

UNITED STATES

vs.

JOURDEN.

Assistant U. S. Attorney Castle stated to the Court that the U. S. Attorney's office elected to stand on the complaint filed herein, and would not amend.

Thereupon, upon motion of Geo. B. Grigsby, attorney for the defendant Jourden, it was ordered that this action be dismissed, to which ruling of the Court exception was taken by the U. S. Attorney and exception allowed.

2260.

UNITED STATES

vs.

JOURDEN.

Assistant U. S. Attorney Castle stated in open Court that the U. S. Attorney's office elected to stand on the complaint filed herein and refused to amend.

*In the District Court for the District of Alaska,
Second Division.*

#2259.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

Bill of Exception [In Case No. 2259].

This was an action at law to recover the sum of Two Thousand Dollars alleged to be due from defendant to plaintiff for conducting the business of a wholesale dealer in distilled, malt and fermented liquors between the 1st day of November, 1909, and the 1st day of November, 1910. The original complaint was filed on the 24th day of February, 1911,

and service of summons was regularly had, and thereafter returned into court. On March the 22d, 1911, defendant demurred to plaintiff's complaint on the grounds, first, that the Court had no jurisdiction of the subject of the action; second, that the complaint did not state facts sufficient to constitute a cause of action. Said cause came on regularly to be heard before the court upon said demurrer on the 15th day of April, 1911, and after the hearing of oral argument, the court on the 22d day of April, 1911, filed its opinion sustaining generally the said demurrer, whereof a minute order was made, and said demurrer was accordingly sustained, to which said ruling plaintiff excepted.

Thereafter, and on said 22d day of April, 1911, stipulation between the parties was filed, whereby said plaintiff was granted ninety days within which to elect what other or further action it would take in the said cause, in pursuance whereof on the 8th day of July, 1911, defendant in open court elected to stand upon the complaint herein. On said 8th day of July, on motion of defendant, judgment of dismissal was duly entered herein, to which ruling of the Court and the entry of said judgment said plaintiff duly excepted, and its said exceptions were duly allowed and entered, and now in furtherance of justice, and that right may be done, the plaintiff presents the foregoing as its Bill of Exceptions in this case, and prays that the same may be settled and allowed, and signed and certified by the Judge as provided by law.

B. S. RODEY,

United States Attorney and Attorney for Plaintiff.

The foregoing Bill of Exceptions is correct in all respects, and is hereby approved, allowed and settled, and made a part of the record herein.

Done in open court at the general January term thereof, and on this 15th day of July, 1911.

CORNELIUS D. MURANE,

District Judge.

Service by receipt of a true copy of the foregoing Bill of Exceptions admitted at Nome, Alaska, on this 13th day of July, 1911.

ELWOOD BRUNER,

Of Attorneys for Defendant.

[Endorsed]: 2259. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Bill of Exceptions. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 13, 1911. John Sundback, Clerk. By ———, Deputy.

Refiled in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 15, 1911. John Sundback, Clerk. By ———, Deputy.

[Minutes—July 15, 1911—Re Settlement of Bill of Exceptions, Allowance of Writ of Error, etc., in Case No. 2259.]

*In the District Court for the District of Alaska,
Second Division.*

Term minutes, General, 1911, Term, beginning February 1, 1911.

Saturday, July 15, 1911, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court the following proceedings were had:

2259.

UNITED STATES

vs.

JOURDEN.

Mr. N. H. Castle, Assistant U. S. Attorney, presented to the Court the proposed bill of exceptions, heretofore filed, and stated to the Court that the same had been agreed upon as a true and correct bill of exceptions, and moved that the same be now settled and allowed; and the Court, having considered said bill of exceptions as proposed, settled and allowed the same as a true and correct bill of exceptions herein.

Thereupon Mr. Castle, Assistant U. S. Attorney, presented to the Court a petition for writ of error and order allowing writ of error; the Court, having considered said petition, allowed said writ of error, and signed an order allowing same. Thereupon

Assistant U. S. Attorney Castle presented to the Court a writ of error and citation herein, which were allowed and signed by the Court. And thereupon Assistant U. S. Attorney Castle presented to the Court a stipulation signed by the attorneys for plaintiff and defendant herein, agreeing that this cause be heard before the Circuit Court of Appeals for the Ninth Circuit, at Seattle, State of Washington, and moved the Court for an order setting the case to be heard at Seattle, which motion was allowed by the Court and an order signed to that effect.

On motion of Assistant U. S. Attorney Castle, the Court granted an order enlarging the time to docket the case in the Circuit Court of Appeals, to the 15th day of September, 1911. Order filed.

*In the District Court for the District of Alaska,
Second Division.*

#2259.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

Assignment of Errors.

Comes now plaintiff in the above-entitled action and assigns the following errors upon which it will rely:

1. The Court erred in sustaining the demurrer to plaintiff's complaint;
2. The Court erred in dismissing said action and entering a judgment of dismissal thereof.

B. S. RODEY,
United States Attorney and Attorney for Plaintiff.

Service of the foregoing Assignment of Errors is hereby admitted this 13th day of July, 1911.

ELWOOD BRUNER,
Of Attorneys for Defendant.

[Endorsed]: #2259. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Assignment of Errors. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 13, 1911. John Sundback, Clerk. By —————, Deputy.

*In the District Court for the District of Alaska,
Second Division.*

#2259.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

Petition for Writ of Error.

The United States of America, plaintiff in the above-entitled cause, feeling itself aggrieved by the sustaining of the demurrer to the complaint, and the entry of judgment of dismissal herein on the 8th day of July, 1911, comes now by B. S. Rodey, United States Attorney for the Second Division of the District of Alaska and attorney for plaintiff, and petitions said court for an order allowing said plaintiff to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the 9th Circuit under and according to the laws of the United States in that behalf made and provided and without bond.

And your petitioner will ever pray.

B. S. RODEY,
United States Attorney and Attorney for Plaintiff.

Service of the foregoing petition is hereby admitted this 15th day of July, 1911.

GEORGE B. GRIGSBY,
Of Attorneys for Defendant.

[Endorsed]: # 2259. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Petition for Writ of Error. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 15, 1911. John Sundback, Clerk. By —————, Deputy. R.

*In the District Court for the District of Alaska,
Second Division.*

#2259.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JOSEPH JOURDEN,
Defendant.

Order Allowing Writ of Error.

Upon motion of B. S. Rodey, United States attorney and attorney for plaintiff, and upon filing the petition for writ of error and assignment of errors,

IT IS ORDERED that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the 9th Circuit the judgment of dismissal heretofore entered herein.

No cost or supersedeas bond shall be required of plaintiff.

Done in open court this 15th day of July, 1911.

CORNELIUS D. MURANE,

District Judge.

2259. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Order Allowing Writ of Error. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 15, 1911. John Sundback, Clerk. By —————, Deputy. R.

*In the District Court for the District of Alaska,
Second Division.*

#2259.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

**Stipulation [That Hearing may be Had at Seattle,
Washington].**

It is hereby stipulated between counsel for the respective parties hereto that hearing upon the Writ of Error herein may be had at the city of Seattle, State of Washington, at the session of the United

States Circuit Court of Appeals at said place.

Dated at Nome, Alaska, this 14th day of July, 1911.

B. S. RODEY,

United States Attorney and Attorney for Plaintiff.

ELWOOD BRUNER,

J. ALLISON BRUNER,

GEO. B. GRIGSBY,

Attorneys for Defendant.

[Endorsed]: # 2259. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Stipulation. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 15, 1911. John Sundback, Clerk. By —————, Deputy. R.

*In the District Court for the District of Alaska,
Second Division.*

#2259.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

Order Extending Time to File Transcript of Record.

Now, on this 15th day of July, 1911, and on motion of B. S. Rodey, attorney for the plaintiff, for the extension of time in which to file a transcript herein in the United States Circuit Court of Appeals for the 9th Circuit,

IT IS ORDERED that the time in which to file said transcript and docket said cause in said United

States Circuit Court of Appeals for the 9th Circuit be and the same is hereby extended to September the 15th, 1911.

Done in open court this 15th day of July, 1911.

CORNELIUS D. MURANE,

District Judge.

[Endorsed]: #2259. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Order Extending Time to File Transcript of Record. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 15, 1911. John Sundback, Clerk. By ———, Deputy. R.

UNITED STATES OF AMERICA.

District Court, District of Alaska, Second Division.

Cause No. 2259.

UNITED STATES,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

Praeceptum [for Record].

To the Clerk of the Above-entitled Court:

You will please prepare record on appeal in above cause and include therein: (1) Summons and Complaint; (2) Demurrer; (3) Court's Opinion on Demurrer; (3) Min. Order Sustaining; (4) Stipulation; (5) Minute entries of July 8th; (6) B. of Ex.; (7) Minute order of July 15th as to B. of Ex.; (8) Ass. of Errors; (9) Order Allowing; (10) Writ; (11)

Citation; (12) Stip. fixing Seattle; (13) Order Ex. Time.

N. H. CASTLE,
Asst. U. S. Atty.

July 15, '11.

[Endorsed]: Cause No. 2259. District Court, District of Alaska, ——— Division. U. S. Plaintiff vs. Jos. Jourden, Defendant. Praeipe. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 15, 1911. John Sundback, Clerk. By —————, Deputy. R.

[Certificate of Clerk U. S. District Court to Record.]

*In the District Court for the District of Alaska,
Second Division.*

No. 2259.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 39, both inclusive, are a true and exact transcript of the Summons, Complaint, Demurrer, Court Minutes of April 22, 1911 (sustaining demurrer) in cause No. 2259, Court's Opinion on Demurrer, Stipulation, Court Minutes of July 8, 1911, in re Cause No. 2259, Bill of Exceptions, Court Minutes of July 15, 1911 in re Cause No. 2259, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Stipulation for hearing at Seattle, Order Extending Time

to File Transcript of Record and Praeceptum for Record, in the case of United States of America, plaintiff, vs. Joseph Jourden, defendant, No. 2259-Civil, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Writ of Error and original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript 12.05.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 18th day of July, A. D. 1911.

[Seal]

J. SUNDBACK,
Clerk.

*In the District Court for the District of Alaska,
Second Division.*

#2259.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America to the Honorable Cornelius D. Murane, Judge of the District Court for the Second Division of Alaska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you between the United States of America, plaintiff in error, and Joseph Jourden, defendant in error, a manifest error

hath appeared to the great damage of the said United States of America, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that done under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Justices of the United States Court of Appeals for the 9th Circuit in the city of Seattle, in the State of Washington, together with this writ, so as to have the same at said place and said Circuit on the 14th day of August, 1911; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 15th day of July, 1911.

Attest my hand and the seal of the District Court for the District of Alaska, Second Division, at the Clerk's Office at Nome, Alaska, this 15th day of July, 1911.

[Seal]

J. SUNDBACK,

Clerk of the District Court for the Dist. of Alaska,
Second Division.

Allowed this 15th day of July, 1911.

CORNELIUS D. MURANE,

Judge of the District Court for the Dist. of Alaska,
Second Division.

[Endorsed]: #2259. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Writ of Error.

*In the District Court for the District of Alaska,
Second Division.*

#2259.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH JOURDEN,

Defendant.

Citation [Original].

United States of America,—ss.

The President of the United States to Joseph Jourden and to Messrs. George B. Grigsby, Elwood Bruner, and J. Allison Bruner, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the 9th Circuit to be holden at the city of Seattle, in the State of Washington, within thirty days from the date of this writ, to wit: on the 14th day of August, 1911, pursuant to a writ of error filed in the Clerk's Office of the District Court for the District of Alaska, Second Division, wherein the United States of America is plaintiff and Joseph Jourden is defendant in error, to show cause, if any there by why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States this 15th day of July, 1911, and of the independence of the United States of America the One Hundred and Thirty-seventh.

CORNELIUS D. MURANE,

District Judge for the District of Alaska, Second Division.

[Seal]

Attest: J. SUNDBACK,

Clerk of the District Court for the District of Alaska, Second Division.

Service of the foregoing citation and receipt of a copy thereof admitted this 15th day of July, 1911.

GEORGE B. GRIGSBY,

Of Attorney for Defendant.

[Endorsed]: In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Joseph Jourden, Defendant. Citation.

[Endorsed]: No. 2019. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. Joseph Jourden, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Second Division.

Filed August 16, 1911.

F. D. MONCKTON,

Clerk.

By Meredith Sawyer,

Deputy Clerk.

IN THE
**United States Circuit Court
of Appeals**
FOR THE
NINTH CIRCUIT

**Error to the District Court of Alaska for
the Second Division.**

UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

JOSEPH JOURDEN,
Defendent in Error.

No. **2019**

Brief of Plaintiff in Error

B. S. RODEY,

*United States Attorney
for the Second Division of Alaska*

ELMER E. TODD,
Of Counsel.

N. H. CASTLE,
Assistant U. S. Attorney

IN THE
**United States Circuit Court
of Appeals**
FOR THE
NINTH CIRCUIT

**Error to the District Court of Alaska for
the Second Division.**

UNITED STATES OF AMERICA,

Plaintiff in Error.

vs.

JOSEPH JOURDEN,

Defendent in Error.

No.

Brief of Plaintiff in Error

STATEMENT OF CASE.

This is one of two civil suits (#2259 and 2260) brought by the government against the defendant in the trial court. Only this one (#2259) comes here under the writ of error. It has been stipulated that for the present the other case (#2260)

is to remain in *statu quo* to abide the decision here.

The object of each of the suits is to recover a balance of one thousand dollars in each of the years 1910 and 1911, or two thousand dollars in each suit, alleged to be due from defendant to make up the difference between the statutory (35 Stats. 602) license fee, charge or tax, for a barroom or retail liquor license, and that required for a wholesale license for the sale of spirituous and malt liquors in Alaska during these years.

It is in effect alleged in the complaint (see copy in transcript) that defendant during those years possessed a retail liquor license, the fee for which is a thousand dollars per annum, but that he in fact went beyond his privileges thereunder and conducted a large wholesale business, the fee for which is two thousand dollars per annum. He demurred to the complaint on general grounds, but at the hearing his counsel only argued his right to keep any size of stock he chose on hand, and to make as many sales up to the limit of four and seven-eighths ($4\frac{7}{8}$) gallons per sale and delivery as he desired under his retail license, even to the same person several times on the same day, etc.

However, the court sustained the demurrer for

the sole reason (see opinion in transcript) that the remedy of the government should under the statute be a criminal prosecution instead of a civil suit. This holding of the trial court is the error complained of, and is the only point as we see it, to be decided here.

ARGUMENT.

The learned judge of the trial court, as will be seen from the opinion, based his decision on the proposition that the sections of the code enacted by congress for Alaska referred to (30 Stats. 1253) are criminal sections, and by inference exclude all right in the government to sue civilly for the doing of any act that is made a crime thereby. This is where the court erred, by misapprehending the character of the proceeding, that is, supposing it to be brought under the statute referred to. On the contrary, what the government really is contending is that the doing of the act—wholesaling under a retail license,—simply creates a plain civil liability, irrespective of and without waiving the crime connected with the doing of the act, and that for this liability it has an inherent right to recover. It is unquestioned that there are no common law crimes against the United States. Every crime

against the United States must of course be born of the violation of an express statute, but this is not generally so as to a civil liability,—even one growing out of a tort or crime. There are, no doubt, many torts that may be committed against the government which are not defined as crimes by any act of congress, yet for which the government, like any other plaintiff, may recover in a civil proceeding. and it has this right simply on general principles.

A private plaintiff can waive a tort and sue in assumpsit. Then, why cannot the government defer or even waive its right to prosecute, and sue civilly for a liability? It does not necessarily waive its right (nor has it done so in this case) to prosecute for the crime, because it seeks to recompense itself for the act or damage done to it by the defendant. If a defendant on a proper showing lawfully obtains a retail license costing a thousand dollars, as this defendant did, and under cover of it wrongfully wholesales for a considerable period at large profit to himself, without knowledge of the government officials, and thereby attempts to evade payment for a wholesale license or tax, which would cost him two thousand dollars, where is the reason

in any rule that would prevent the government from recovering the additional fee or tax, whether it waives the crime involved in the act or not?

The trial judge appears to wholly lose sight of the real contention of the government. The general proposition is not denied, that ordinarily where a new right is given and the remedy provided, that remedy and that particular one only, must be followed, but it is contended (see the transcript for a copy of the complaint) that defendant by fraud and subterfuge wholesaled while being only entitled to retail, and so became liable for the higher license, the amount of which is *fixed* and definite in the law, and that hence, the government can recover this money due in a civil action.

By demurring, defendant admits that he committed the fraud and resorted to the subterfuge. Can he also escape with the profits arising from his illegal act, or can he be made to pay for the privilege from which he derived a large profit as the government insists he can?

The government is not claiming a "fine;" if it was, then, of course, the statutory criminal mode of procedure would have to be followed. On the contrary, it is seeking to recover this money as a

part of its revenues,—as a license fee or tax, definite and fixed by the law. In other words, it is a liability,—a debt created by law for the doing of a certain class of business, for which defendant has made himself liable by his own wrong. Call it even statutory liquidated damages, if you will. Defendant had no permission to carry on a wholesale liquor business and he commits a crime when he does so without such permission. He was not supposed to be carrying it on. It is of course the sworn duty of officers of the government to prevent him from so doing. The government can effectually put a stop to his action in that regard under the statute, but the existence of the power and right to do this does not, we submit, prevent the government from recovering civilly as a part of its revenues the money due as a consequence of the illegal act of the defendant.

The court below in its opinion in substance makes the point that the people of Alaska are interested in licenses and that they may consent or refuse by a majority expression of opinion to the sale of liquor in particular localities, and that if the government could permit violations of the law by permitting people to sell liquor and then recover

the amount of the license due for this violation, it would defeat this right of the people. With all due respect, we fail to see the force of this argument, because it is hardly a legitimate one. There is no presumption that the government officials would intentionally permit such a thing to occur, yet, if any person does violate the law, why should not recovery be had civilly for a liability growing out of it? As well might it be argued, if the point made by the court is to be given force, that because a delinquent is prosecuted and a fine imposed, he thereby acquires some right to continue violating the law.

It is not denied that as set out in the opinion of trial judge, the license or Tax Act of Congress for Alaska (sections 472 and 474, Carter's Code) contemplates a criminal proceeding against those who violate it, nor that if the proceeding here was brought with the object of having a *fine* imposed or causing the imprisonment of the defendant, it would have to be by information or indictment. No matter what the government's intention may later be in that regard, such is not now its object by this proceeding.

It is submitted that neither the License Act,

supra, or any other Act of Congress for Alaska excludes a civil remedy such as is here sought to be invoked. In fact, this proceeding has no relation to the License Act, save for the ascertaining of the cost of a wholesale license, which is fixed at two thousand dollars by the Act of Congress of Feb. 6th, 1909, amending section 468 of the Alaska Code, 35 Stats. 602, bottom of page.

On the other hand, the government contends and submits that another section of the code enacted by Congress for Alaska *does* authorize and permit such a proceeding as this; section 217 of part 1 comprising the miscellaneous provisions and definitions of Carter's Code, page 44, reads as follows:

“* * * That the omission to specify or affirm in this act any liability to any damages, penalty, or forfeiture, or other remedy imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.”

And immediately thereafter section 218 provides that:

“The common law of England as adopted and understood in the United States shall be in force in said district, except as modified by this Act.”

So it can be seen the government as well as all other litigants in Alaska can avail itself of all civil common law remedies. Surely this balance of license tax due *ex maleficio* from this defendant is a statutory liability under this license or tax law, and its recovery through a civil proceeding is, under the last two above quoted provisions, permitted generally by the code and the common law.

The learned judge evidently felt bound by what he considered an authoritative ruling of the supreme court in *United States vs. Claflin*, 97 U. S. 546. But it will be seen from an examination of that case, that the statute under which the proceeding then before the supreme court was brought, is wholly different from the one being considered. That was an action in debt, whereby the government sought under the act of 1823 against smuggling, to recover under the provision of the statute "A sum double the amount or value of the goods, wares or merchandise so received, concealed, or purchased," and the court properly held that the statute clearly only intended a criminal proceeding, because it was set out in the law that the defendant "on conviction thereof" shall "forfeit and pay," etc. The liability did not occur until after conviction. There

is no such condition attaching to this proceeding. It will also be observed that in the Claflin case the amount to be recovered was not fixed or definite, because under the act then being considered, the government would first have to prove the "value of the goods, wares or merchandise received, concealed or purchased," then double that value in order to fix the liability of the defendant. In the case at bar the statute itself in the first instance by its terms fixes the fee for wholesaling liquors in Alaska at two thousand dollars, and that is the only purpose for which reference is at all made to the license act. The mere act of wholesaling, which is matter of proof, fixed the liability.

It may be admitted that because the money derived from licenses is turned over to the municipalities and people of Alaska to help defray the expense of the local government, that in an indirect way the people of the territory are interested in the collection of these licenses or taxes, but it must not be forgotten that Alaska is yet but a crudely organized territory belonging to the Nation, over which Congress has supreme sovereign power, save as limited by the Constitution. There is no completely organized local government in the sense

of having a local legislature with power to pass laws as in the other territories. The government in Alaska is carried on directly by National officials, but principally through four judges and a governor appointed under National law. Congress acts directly as to things territorial in Alaska. In fact, it is a sort of dignified Board of Aldermen for the district. Therefore, rules and considerations that might apply to private litigants often are inapplicable and of no force as to this National power in the enforcement of its laws or the collection of its revenues.

It is not denied that there are several states in the Union where the courts hold, although the soundness of the reasoning for the rules they adhere to in this regard might be subject to question, that only when direct leave is given by law can a civil proceeding be brought to recover a license fee for a violation of a license act; that it is not a contract or obligation; that it is not a debt; that it requires two parties and a meeting of minds to agree upon a contract, etc. This appears to be the rule in three or four states, particularly Kentucky, Mississippi, Arkansas and probably California, 23 Cyc. 151, subhead d. and cases cited; 17 Am. & Eng. Ency.

of Law, 2 ed. 271, subhead d. and cases cited. We do not admit the unvarying applicability of this doctrine, and especially when the government itself is the plaintiff, because the sovereign can and often does create an obligation of its citizens to pay money or to perform certain duties whether the citizens will or not, but we contend the rule should be and is, where not specifically or by necessary implication prohibited, directly the opposite Nationally, and especially when the government attempts to collect money due it for the sale of intoxicating liquors under its revenue laws.

The supreme court of the United States has held (we are quoting from the syllabus):

“By the Internal Revenue Law the United States are not prohibited from adopting the action of debt or any other common law remedy for collecting what is due them. This is true on general principles.” *Savings Bank vs. United States*, 19 Wall. 228.

It was also stated in this last cited case (page 238 Opinion):

“That where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common law remedies.”

But it then proceeds:

“But it is important to notice upon what the rule is founded. The reason of the rule is that the statute by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced when anyone to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, and he is forbidden to make use of any other, but by the internal revenue law, the United States are not prohibited from adopting any remedy for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibition, if any, either express or implied, contained in the enactment of 1866 are for others not for the government, etc.”

The court then proceeds to state the well known rule of law that the King is not bound by any act of Parliament, unless named therein, etc., in the following language:

“The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently

in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution."

It may also be noticed that the Alaska License Act, *supra*, (30 Stats. 1340, sec. 477) provides that:

"Nothing in this act shall in any way repeal, conflict or interfere with the general laws of the United States imposing taxes on the manufacture or sale of intoxicating liquor for the purpose of revenue and known as the 'Internal-Revenue laws.' "

And also that section 3243 R. S. U. S. provides that:

"The payment of any tax imposed by the Internal Revenue Laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State * * *."

But aside from all this, the government is here contending that this license law of Alaska is an extensive piece of revenue legislation,—a method of taxation enacted by Congress to in some measure reimburse the Nation for its heavy outlay in main-

taining the government of the District of Alaska, and whilst as to intoxicating liquors the license law is of necessity specific in terms and regulatory in its operation, it is nevertheless strictly a part of a comprehensive revenue measure. The license fees are excises within the constitutional sense of the term and are raised as local taxes imposed for the purpose of raising funds to support the local government. In fact, this is almost the language used by the supreme court of the United States when construing this very Act of Congress in *United States vs. Binns*, 194 U. S. 491.

In addition, the court is requested not to lose sight of the fact that the National Government with reference to its special taxes under its internal revenue laws as to tobacco and spirituous and malt liquors, has maintained and is under National law maintaining an entirely different rule from that of the few States above referred to, and has repeatedly brought civil suits for the recovery of amounts due as a special tax on the manufacture or sale of those products independent of and without waiving its right to prosecute criminally for the offenses involved in a violation of the laws imposing the tax. Therefore, as above stated, Alaska being

peculiarly under the protective wing of the National Government, and the enactment of a local code for the jurisdiction being merely a matter of National expediency and administrative convenience, it is submitted, that a similar rule should prevail locally in Alaska, and that even in the absence of sections 217 and 218 of the Alaska code above referred to, a civil action is maintainable to recover the revenues.

After an examination of the cases in some of the States holding to the rule that the requirement to pay a license is not a debt, and without assuming any superior criticism, it is respectfully submitted that they do not proceed on sound reasoning, even under the laws of such States. Their courts seem to follow without question one or two ill considered and probably inadvertant cases and the encyclopedias thereafter echo the result as law. No good reason can be adduced why any government, state or federal, even in the absence of any specific statute directly authorizing it, should not have the right to collect amounts which the law says its citizens shall pay, if they do a certain sort of business, and this without waiving its right to prosecute those same citizens for the crime involved.

It will be seen that Chap. 44 of the License Act of Congress for Alaska, 30 Stats. 1335, is entitled as "of miscellaneous provisions in relation to criminal proceedings in justice courts" and that it begins with section 453 and continues to section 481 inclusive of the main Act; yet, section 460 specifies and fixes the license fee or tax per annum for doing, carrying on or following more than forty different kinds of ordinary business, callings or avocations. It is true section 461 provides a penalty and a mode of prosecution for carrying on any of these lines of business or following any of the specified avocations without having obtained a license, and it is also true that section 462 and some of the following sections refer specifically to the sale of intoxicants, but would it be reasonable to say that the government of the United States through its administrative officers in Alaska would be without alternative driven to indicting any person who refused to pay the license or tax, if it chose to waive or defer a criminal prosecution, instead of having the right to sue civilly for the amount due as the same is definitely fixed in the law itself? It is respectfully submitted that it would be unreasonable to so hold. The right to levy and sue for taxes is an in-

herent attribute of sovereignty. It can be seen that the liquor license sections of this Alaska license fee Act, are but a small portion of the whole body of legislation enacted for the district. Other recent Acts of Congress with reference to fisheries impose licenses or taxes for the catching, boxing and barreling of fish at so much per pound, case or barrel. See act of June 26, 1906, 34 Stats. 478. The wharfage tax which is a part of the license act we are discussing and covers the entire district of Alaska is fixed at ten cents per ton and amounts in some instances to large sums of money per annum. Would it be sound reasoning to contend that for a violation of the Act in this regard the government would be unable to sue civilly, but instead would be obliged to await the meeting of a grand jury to return indictments for daily violations? Instances could arise that would necessitate the finding of hundreds of indictments against a few persons to recover a relatively small sum of money. To thus distort the possibilities is often the best way of pointing out an untenable position. As illustrative of this point, in the case of *Jones vs. Stewart*, decided by the supreme court of Georgia, in 1893, 44 S. E. 879, the court held that unless the legislature has so

stated in unequivocal language, it would not hold that a criminal prosecution is the sole remedy for the collection of taxes; that such a holding would be opposed to common sense, sound business principles and a wise public policy,—and that a court ought not to do it, save when there is no escape from the letter of the law.

Can it be said that there is no escape from the letter of the License Act of Congress for Alaska that we are here discussing, from holding that it contemplates only a criminal prosecution to the exclusion of a civil remedy? With all due respect to the trial judge, it is at least very hard to believe that such is a proper view to take of the law. On this particular point the supreme court of Alabama in *State vs. Fleming*, 20 Southern 847, which was a case very similar to the one at bar, because it was not brought to recover a fine, but was to recover the amount of a license fee as fixed by law, said:

“We cannot reasonably conceive that it was ever intended that the collection of taxes, whether assessed upon property or imposed upon avocations, should be left to the *discretion of a grand jury*, to be exercised, perhaps, differently under like circumstances, or that the liability for taxes should be established beyond a reasonable doubt. It must be borne in mind that the

present action is not to recover the penalty imposed for the violation of a statute. It may be that if the suit was for the amount of the fine,—that is, three times the amount of the taxes,—it could not be done except by indictment.”

But not all the states hold to this so called rule that the law itself must give specific leave to bring a civil suit for the recovery of fines or forfeitures involving criminal acts. It was held in Missouri in *Knox vs. Hunolt*, 19 S. W. 628, that:

“The right to bring such suit (civil action) is not taken away by Rev. St. 1879, sec. 1331, which makes the misappropriation of County funds a crime punishable by fine or imprisonment.”

In like manner it was held in Alabama in *State vs. Fleming*, 20 Southern 846, *supra*, that:

“The provisions of Cr. Code, Sec. 3829, declaring that any persons engaged in carrying on a business for which a license is required, without having taken out such a license, shall on conviction be fined three times the amount thereof, cannot be construed as excluding the right of the State to maintain a civil action for the recovery of such a license.”

A quite instructive case, where the supreme court in a measure reasons out the proper construction to be given to such statutes as we are here discussing is that of *Hepner vs. U. S.*, 213 U. S.

103, which was decided as recently as April, 1909. Mr. Justice Harlan's opinion in that case is a learned essay covering the entire history of the subject and citing the principal cases almost from the beginning of our government. One of the principal holdings is that:

"A penalty may be recovered by a civil action, although such an action may be so far criminal in its nature that the defendant cannot be compelled to testify against himself therein in respect to any matter involving his being guilty of a criminal offense."

Still more recent is the decision of the same court in November, 1909, in *United States vs. Stevenson*, 215 U. S. 190, where Mr. Justice Day, delivering the opinion of the court, also reviews the authorities to some extent, and as we think, supports the view we are here advocating. The case was the exact reverse of the one at bar, and it was held, quoting from the syllabus that:

"The fact that a penal statute provides for enforcing the prescribed penalty of fine and forfeiture by civil suit does not necessarily exclude enforcing by indictment; and so held in regard to penalty for assisting the immigration of contract laborers prescribed by sections 4 and 5 of the Immigration Act of Feb. 20, 1907."

We submit that the License Tax Act enacted by Congress for Alaska and which we are discussing, exhibits no intention to deny the government the ordinary remedies, and is not intended to be exclusively criminal,—therefore, such denial ought not to be inferred.

We are free to admit that the most cogent sentence in the opinion of the trial judge is: “It will be noted that our statute does not declare a forfeiture of the license fee or two thousand dollars, and that it may be collected by an appropriate remedy by simply imposing a penalty for the violation of the law by way of a fine or imprisonment.” But we insist that this sentence has cogency only because the learned judge seemed to have in view the idea that the government was suing to recover a penalty, which it is not doing. If his view in this regard were to obtain, then it could also be held that the same is true as to every one of the more than forty lines of business, callings and avocations mentioned in the entire License or Tax Act, and surely this would not be seriously contended. It would drive the government to the confession of the fact that Congress prevents it from collecting a single dollar of tax in the whole district of

Alaska, save by information or indictment. With all due respect this is unreasonable.

THEREFORE, the demurrer in the lower court should have been overruled, the defendant should have been obliged to answer the complaint, and the government permitted to prove its case, if it can.

All of which is respectfully submitted.

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S. v. Chamberlain
219 U.S. 250.

No. 2021

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE FIDELITY LUMBER COMPANY, a Corporation,
Plaintiff in Error,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court
for the Western District of Washington,
Northern Division.

FILED

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**Upon Writ of Error to the United States Circuit Court
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*In the Circuit Court of the United States for the Western
District of Washington, Northern Division.*

GREAT NORTHERN RAILWAY COMPANY, a corporation, <i>Plaintiff and Defendant in Error,</i>	}	No. 1948.
vs.		
THE FIDELITY LUMBER COM- PANY, a corporation, <i>Defendant and Plaintiff in Error.</i>		

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*In the Circuit Court of the United States for the Western
District of Washington.*

<p>GREAT NORTHERN RAILWAY COMPANY, a corporation,</p> <p style="text-align: center;">vs.</p> <p>FIDELITY LUMBER COMPANY, a corporation,</p>	}	<p><i>Plaintiff,</i></p> <p>No. 1948.</p> <p>COMPLAINT.</p> <p><i>Defendant.</i></p>
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Comes now the plaintiff above named, and for its cause of action against the defendant above named, respectfully shows to the Court as follows:

I.

That the Great Northern Railway Company is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota.

II.

That the defendant, the Fidelity Lumber Company, is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

III.

That the Great Northern Railway Company is now and at all the times hereinafter mentioned was a common carrier of freight and passengers from points within to points without the State of Washington, and from points within to points without the State of Idaho, and as such carrier is and at all times was subject to and amenable to the provisions of that certain act of Congress entitled "An Act to Regulate Commerce," approved February 4th, 1887, and the acts of Congress amendatory thereof and supplemental thereto.

IV.

That heretofore and prior to October 31st, 1907, plaintiff, together with other carriers amenable to said Act to Regulate Commerce, and in pursuance of the provisions of said Act, filed and published certain tariffs prescribing rates for the transportation of lumber, shingles and other forest products from points within to points without the States of Washington and Idaho, which were substantially higher than the rates theretofore in force between said points, and in force up to and including October 31st, 1907. That heretofore, to-wit, on or about October 31, 1907, the Honorable C. H. Hanford, one of the judges of the above court, signed and entered an order by the terms whereof this plaintiff was enjoined from collecting or receiving from the Pacific Coast Lumber Manufacturers' Association, or from the Shingle Mills Bureau, or from any persons, firms or corporations who were members of the said Pacific Coast Lumber Manufacturers' Association or of the Shingle Mills Bureau, or from the consignees of said Association or Bureau or the members thereof, amounts for the shipment of lumber, shingles or other forest products described in its certain tariffs to which this plaintiff was a party, and filed with the Interstate Commerce Commission, and known as I. C. C. Tariff Number 850, and Great Northern I. C. C. No. A2667, and Northern Pacific I. C. C. Tariff No. A 3432, in excess of the rates shown in the schedules of said tariffs on file with the Interstate Commerce Commission and in force up to and including October 31, 1907. That said order so signed and entered by the Honorable C. H. Hanford, was signed and entered upon a certain bill of complaint filed in said Court wherein the said Pacific Coast Lumber Manufacturers' Association, and others, were complainants, and the Great Northern Railway Company, and others, were defendants, which said bill and the cause in which the same was filed, was known and designated in said Court as case No. 1565.

V.

That thereafter the Potlatch Lumber Company, the Fidelity Lumber Company, and others, made application to the Court above named for leave to file a petition in intervention, by the terms whereof they prayed that the Great Northern Railway Company might be restrained from collecting from the said Potlatch Lumber Company, the Fidelity Lumber Company and the others joining with it in said petition, any rates for the transportation from points within to points without the States of Washington and Idaho, of lumber and forest products, and the commodities described in said tariffs, higher than the said Great Northern Railway Company was permitted by the restraining order above described to collect from the Pacific Coast Lumber Manufacturers' Association and Shingle Mills Bureau, and the members thereof.

That thereupon, and on the 18th day of November, 1907, a further order was signed and entered by the said C. H. Hanford, Judge of said Court, which order is in words and figures as follows, to-wit:

(Title of cause omitted.)

Now on the 18th day of November, 1907, it appearing to the Court that the above named intervenors having exhibited their bill of intervention, and leave to file same having been given, and thereupon intervenors having filed said bill, and it appearing therefrom that the intervenors are entitled to relief as shown by said bill and that intervenors are entitled to relief by injunction the same as the original complainants therein;

It is, therefore, hereby ordered that until further order of the Court, the carriers who are parties defendant to this suit shall not collect from the intervenors or either of them or from the consignees or any consignee of the intervenors or either of them amounts on the shipment of commodities or any commodity shown in the tariffs described in the amended bill and intervention bill herein and especially Interstate Com-

merce Commission Tariff No. 850 and supplements thereto in excess of the rate shown in the schedule of tariffs existing prior to November 1, 1907 (and prior to said Tariff No. 850), covering the transportation of said commodities or any thereof, provided that, and as condition of this order, the intervenors shall execute to defendants and file herein their joint and several bond, with good and sufficient surety, in the sum of seventy-five thousand dollars, to be approved by the Court, conditioned that the intervenors will save, indemnify and keep harmless the defendants and each of them from all loss, cost and damage by reason of the issuance of said injunction, and further conditioned that if said rates shall be finally held to be reasonable or rates in excess of the superceded tariff shall be established by the Interstate Commerce Commission or this Court, each of the intervenors who may be served by either of the defendants as a carrier of lumber, shingles or timber products, shall pay to such carriers the difference, if any, between the amount paid for such service at the rate provided herein, and whatever rate shall be finally established as the rate lawfully chargeable on and after November 1, 1907. This order shall take effect immediately, and the bond required shall be executed, filed and approved on or before November 29, 1907.

This Court especially reserves the right on showing made, to have additional bond or bonds given, from time to time, as it shall deem just and proper.

This order applies to freight originating on the lines of any party defendant hereto, in the States of Washington and Idaho, or either of said States, and each defendant herein over or on the lines of which shipment may be made.

Whenever any intervenor shall offer to any of the defendant carriers any of the commodities above specified for shipment as provided herein, he or it shall execute and deliver to the carrier an instrument in writing declaring he or it is the consignor of the commodities so offered for shipment, and that

the shipment is tendered in accordance with the provisions of this order.

Each of the intervenors is hereby ordered to furnish and deposit with the Clerk of this Court monthly reports showing each and every shipment made by him or it, giving the name of the shipper, the character and weight of each shipment, the points of origin and destination, and the amount paid or charged under rates existing prior to November 1, 1907, and the difference in amount between the amounts so paid or charged under rates existing prior to November 1, 1907, and the difference in amount between the amount so paid and charged and the amount that would accrue under said Tariff 850, and restrained by this order.

It is further ordered that a copy of this order and the order permitting the filing of the bill of intervention of the above named intervenors and a copy of the bill of intervention of the above named intervenors shall be served upon the solicitors for defendant, and that the defendants appear and plead thereto, and show cause, if any, at ten o'clock A. M., on November 29th, 1907, why this order should not have been entered and remain effective.

Done in open Court this 18th day of November, 1907.

C. H. HANFORD, Judge.

VI.

That thereafter the defendant Fidelity Lumber Company agreed to and with the Great Northern Railway Company that in accordance with the terms of said order of November 18, 1907, it would pay to the Great Northern Railway Company, for and on account of the shipment and transportation of lumber, shingles and forest products under said order, from points within to points without the States of Washington and Idaho, the difference, if any, between the amount paid for such service at the rate provided by said order of November 18, 1907, and

whatever rate should be finally established as the rate lawfully chargeable therefor on and after November 1, 1907.

VII.

That in pursuance of the said order of November 18, 1907, and of the agreement so made as aforesaid, this plaintiff received and caused to be transported for the said defendant lumber, shingles and forest products from points in Washington and Idaho, being points upon the lines of this plaintiff, to points of destination in other States, viz., between the points described in the tariffs above referred to, which tariffs were superseded by other tariffs to which this plaintiff was a party, and which by their terms became effective on November 1, 1907.

VIII.

That thereafter, and on or about June 2, 1908, the Interstate Commerce Commission, upon the complaint of the Potlatch Lumber Company, defendant, and others, and in pursuance of authority of law vested in said Commission, fixed and determined the rates legally chargeable for the transportation of lumber, shingles and other forest products between points in Washington and Idaho and the points in other States from which and to which the said products were transported by this plaintiff for the defendant, as set forth in the last preceding paragraph; and the difference between the rates paid for the transportation of such commodities for the defendant and the rates so fixed by the Interstate Commerce Commission as the lawful rates for the transportation thereof, amounted to \$2,805.65. That no portion of such difference above mentioned has been paid to this plaintiff by the defendant, or by any person whomsoever.

IX.

That by virtue of the facts above set forth, defendant is indebted to the plaintiff in the sum of \$2,805.65.

Wherefore this plaintiff demands judgment against the defendant in the sum of \$2,805.65, together with its costs and disbursements herein.

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F. V. BROWN,
FREDERIC G. DORETY,
Attorneys for Great Northern Railway Company.

State of Washington,
County of King.—ss.

Frederic G. Dorety, being duly sworn, says: That he is the attorney for the Great Northern Railway Company, the plaintiff in the within entitled action; that he knows the contents of the within Complaint, and that he believes the same, and the whole thereof, to be true; that the said plaintiff is a corporation organized under the laws of the State of Minnesota; that no officer thereof resides or is within the State of Washington.

And further affiant saith not.

FREDERIC G. DORETY.

Subscribed and sworn to before me this 9th day of February,
A. D. 1911.

(Seal)

L. M. KNOX,

Notary Public in and for the State of Washington, residing
at Seattle.

Indorsed: Complaint. Filed U. S. Circuit Court, Western District of Washington, Feb. 9, 1911. Sam'l D. Bridges, Clerk.
W. D. Covington, Deputy.

*In the Circuit Court of the United States for the Western
District of Washington.*

<p>GREAT NORTHERN RAILWAY COMPANY, a corporation,</p>	<p><i>Plaintiff,</i></p>	<p>No. 1948.</p> <p>ANSWER.</p>
<p>vs.</p>		
<p>FIDELITY LUMBER COMPANY, a corporation,</p>	<p><i>Defendant.</i></p>	

Comes now the defendant above named, and for its answer to the complaint of plaintiff herein:

I.

Admits the allegations in paragraph "I" of said complaint.

II.

Admits the allegations in paragraph "II" of said complaint.

III.

Admits the allegations in paragraph "III" of said complaint.

IV.

Admits the allegations in paragraph "IV" of said complaint.

V.

Admits that the Potlatch Lumber Company, the Fidelity Lumber Company, and others, filed their complaint in intervention in said action No. 1565, mentioned in paragraph numbered "IV" of the complaint of plaintiff herein, by leave of Court, and therein and thereby prayed that they have the benefit of the original order in said action and of the intervention order therein, and that the defendants in said action be enjoined and restrained from collecting freight rates on lumber and forest products in excess of the rates in existence

October 31, 1907, from point of shipment to destination, and admits that a restraining order or injunction was issued on the 18th day of November, 1907, enjoining and restraining the defendants in said action as aforesaid, and permitting thereby the intervenors to have the benefit of the order of Court theretofore and then entered, upon compliance with the order of Court with reference to giving of bond; and admits that the order was as set forth in paragraph numbered "V" of the complaint of plaintiff herein; and defendant denies each and every other allegation, matter and thing contained in paragraph numbered "V" of the complaint of plaintiff herein.

VI.

The defendant admits the allegations of paragraph numbered "VI" of the complaint, but in this connection the defendant alleges that the Interstate Commerce Commission cannot legally establish a rate which is not subject to review by the Courts, and that the meaning of the order and the obligation upon defendant in making shipments was to pay such lawful rate as may be finally determined and established by the Courts.

VII.

Defendant admits that in pursuance of said order of November 18, 1907, and the original order entered in said action, the plaintiff received from defendant and caused to be transported from points in Washington and Idaho to points in other States, lumber and forest products as set forth in paragraph "VII" of the complaint. And defendant denies each and every other allegation, matter and thing contained in paragraph numbered "VII" of the complaint of plaintiff herein.

VIII.

Defendant admits that on or about June 2, 1908, the Interstate Commerce Commission, upon the complaint of the Potlatch Lumber Company, defendant, and others, in pursuance of law, fixed and determined the rates legally chargeable for

the transportation of lumber, shingles and other forest products between Washington and Idaho points and points in other States from which and to which said products were transported by plaintiff for the defendant; and defendant denies each and every other allegation, matter and thing contained in paragraph numbered "VIII" of the complaint of plaintiff herein.

Defendant alleges that under and by reason of the law the plaintiff is not entitled to the sum or amount set forth and mentioned in paragraph "VIII" of the complaint of plaintiff herein.

That plaintiff herein and intervenors in said original action do not agree as to what amount the shippers and intervenors should pay the plaintiff herein upon shipments made by said shippers and intervenors. That the shippers and intervenors contend that no greater rate can be charged than that fixed by the Commission from point of shipment to point of destination, and plaintiff herein contends that it is entitled to collect from said shippers and intervenors the Pacific Coast rate for shipments made from points in Eastern Washington and Northern Idaho to points each of the Pembina line, between November 1, 1907, and the date when the Interstate Commerce Commission fixed and determined the rates to be charged by the plaintiff and other carriers. That the claim made by the plaintiff is based purely and simply upon the Pacific Coast rate and not the rates in effect October 31, 1907, nor which were designated in the tariff which it is claimed became effective November 1, 1907, nor the amount fixed by the Interstate Commerce Commission as the rates from Eastern Washington and Northern Idaho to points of destination.

IX.

Defendant denies each and every allegation, matter and thing contained in paragraph numbered "IX" of the complaint of plaintiff herein.

Wherefore defendant prays that the plaintiff have and take

nothing by its action herein, and go hence without day and without relief, and that the defendant have and recover of and from the plaintiff its costs and disbursements herein.

H. M. STEPHENS,
Attorney for Defendant.

State of Washington,
County of Spokane.—ss.

H. M. Stephens, being first duly sworn, upon oath deposes and says:

That he is the attorney for the above named defendant in the above entitled action and makes this verification for and on its behalf. That he has read the foregoing answer and knows the contents thereof, and that the same is true, as he verily believes.

That this verification is made for and on behalf of defendant by affiant, for the reason that defendant has no officer within the district where this action is pending, or within the county of Spokane, where this verification is made, at the time of the making of said verification.

H. M. STEPHENS.

Subscribed and sworn to before me this 2nd day of February,
A. D. 1911.

(Seal)

ERNEST E. SARGEANT,
Notary Public in and for the State of Washington, residing at
Spokane, Wash.

Indorsed: Answer. Filed U. S. Circuit Court, Western District of Washington, Feb. 9, 1911. Sam'l D. Bridges, Clerk.
W. D. Covington, Deputy.

*In the Circuit Court of the United States for the Western
District of Washington.*

GREAT NORTHERN RAILWAY COMPANY, a corporation,	}	No. 1948. STIPULATION.
<i>Plaintiff,</i>		
vs.		
FIDELITY LUMBER COMPANY, a corporation,	}	
<i>Defendant.</i>		

For the purpose of the trial of this action it is agreed between the parties hereto as follows:

I.

That defendant and others made certain shipments of lumber, shingles and forest products over the lines of the Great Northern Railway Company from points in the States of Washington and Idaho to points east of said States, between November 18, 1907, and the date when the tariff filed by the plaintiff herein in accordance with the order of the Interstate Commerce Commission with respect to shipments of like character became effective.

II.

That on account of the shipments so made by the defendant, mentioned in paragraph I hereof, charges were paid according to the tariffs in force up to and including October 31, 1907. That if payments had been made by the defendant on account of such shipments, according to the rates declared to be applicable thereto by the Interstate Commerce Commission by its reparation orders and decisions, the plaintiff would have received from said defendant on account of such shipments, in addition to the sum so paid therefor, the amount of \$2,805.65.

III.

That subsequent to October 31, 1907, the Potlatch Lumber Company, the defendant, and others, intervened in the suit mentioned in paragraph IV of the complaint herein, and secured the restraining order set forth in paragraph V of the complaint herein.

IV.

That subsequent to November 18, 1907, the Potlatch Lumber Company, the defendant, and others, as complainants, filed their complaint against the Great Northern Railway Company and others with the Interstate Commerce Commission, a copy of which complaint is hereto attached, marked Exhibit A, and made a part hereof. That other complaints were also filed with and before the Interstate Commerce Commission by Coast lumbermen.

V.

That decisions were rendered by the Interstate Commerce Commission on June 2, 1908, in what were known as the Coast and Spokane lumber cases, to-wit: Number 1327, *Oregon & Washington Lumber Manufacturers' Association et al. v. U. P. R. R. Co. et al.*; number 1329, *Pacific Coast Lumber Manufacturers' Association et al. v. N. P. Ry. Co. et al.*; number 1335, *Southwest Washington Lumber Manufacturers' Association et al. v. N. P. Ry. Co. et al.*; number 1348, *Potlatch Lumber Company et al. v. N. P. Ry. Co. et al.* That said decisions are reported and set forth in volume 14 of the Interstate Commerce Commission Reports, pages 1 to 60, inclusive, which decisions and opinions are made a part of this stipulation, and the Court shall take same into consideration in deciding and determining this case, and shall also take into consideration any order or opinion in any or either of such cases which may appear in the reports of the Interstate Commerce Commission, and particularly the order of June 22, 1909, which is found at pages 465 to 468, inclusive, of volume 16 of the Interstate Commerce Commission Reports.

VI.

That upon receipt of the decision in case number 1348 before the Interstate Commerce Commission, counsel for complainants therein immediately wrote the Interstate Commerce Commission that it was not the desire or intention to waive reparation or refund, and requested that the matter be held open for further order in that respect.

That subsequently some of the Commissioners were interviewed orally and a petition for rehearing was sent to the Interstate Commerce Commission for filing, and thereupon a petition for rehearing and application to file a supplemental petition were denied, and on January 12, A. D. 1909, the Interstate Commerce Commission entered an order, a copy of which is hereto attached, marked Exhibit B, and made a part hereof.

VII.

That thereafter counsel for complainants in said case number 1348 further wrote the Interstate Commerce Commission that the same rule of reparation or refund was not being applied to shippers from the Spokane district; that is, the intervenors in said action in the United States Court hereinbefore referred to; and the counsel for said complainants also wrote to the Interstate Commerce Commission a letter upon that subject, a copy of which is hereto attached, marked Exhibit C, and made a part hereof.

That thereafter, to-wit, on the 12th day of April, A. D. 1909, the Interstate Commerce Commission entered an order, a copy of which is hereto attached, marked Exhibit D, and made a part hereof.

That thereafter complainants in said proceeding number 1348 before the Interstate Commerce Commission presented and filed and asked that complainants be heard upon their supplemental complaint, petitions for rehearing and application to amend the original complaint, copies of which are hereto attached, marked Exhibits E, F and G, and made a part hereof.

That thereafter on June 22, 1909, the Commission refused

to further consider or permit a further hearing in number 1348, of the supplemental complaint, petition for rehearing and application to amend the original complaint, which order is found at pages 465 to 468, inclusive, of volume 16 of the Interstate Commerce Commission Reports, and made a part of this stipulation.

VIII.

It is agreed that the rates in effect October 31, 1907, and prior thereto from Spokane and points east thereof, on lumber, shingles and forest products, to points east of the eastern boundary of Idaho were not the same, and there is filed herewith, identified by the signatures of counsel, a copy of the tariff in effect on and prior to October 31, 1907, setting forth the rates then applicable to such shipments.

IX.

The parties hereto expressly waive trial by jury herein, and hereby agree that this case shall be submitted to the Court for determination upon the pleadings and this stipulation of facts, without a jury.

GREAT NORTHERN RAILWAY COMPANY,
By FREDERIC G. DORETY,
JAMES B. KERR,

Its Attorneys.

FIDELITY LUMBER COMPANY,
By H. M. STEPHENS,

Its Attorney.

EXHIBIT "A."

BEFORE THE INTERSTATE COMMERCE COMMISSION.
POTLATCH LUMBER COMPANY,
ST. JOE LUMBER COMPANY,
B. R. LEWIS LUMBER COMPANY,
McGOLDRICK LUMBER COMPANY,
LAMB-DAVIS LUMBER COMPANY,
FIDELITY LUMBER COMPANY,

WASHINGTON MILL COMPANY,
ORRIN S. GOOD,
NATIONAL LUMBER COMPANY,
CASCADE LUMBER COMPANY,
SPRINGSTON LUMBER COMPANY,
WM. MUSSER LUMBER & MANUFACTURING COM-
PANY,
PHOENIX LUMBER COMPANY,
STANDARD LUMBER COMPANY,
KARAMIN LUMBER COMPANY,
E. A. HUMPHREY and J. R. HUMPHREY, a co-partner-
ship, doing business under the name of the ELKHORN
SAW MILLS,
BUCKEYE LUMBER COMPANY,
LINDSLEY BROTHERS COMPANY,
W. H. GERHART-BRADRICK LUMBER COMPANY, a
co-partnership composed of W. H. Gerhart and A. V.
Bradrick,
S. H. & L. LUMBER COMPANY, a co-partnership composed
of J. J. Herlihy, A. W. Lammers and Geo. W. Shaw,
IDAHO POLE COMPANY, a co-partnership composed of
W. L. Beckwith and John H. Fowler,
CHEWELAH MILL COMPANY,
THE REEVES-FARRELL LUMBER COMPANY,
POST FALLS LUMBER & MANUFACTURING COM-
PANY,
LACLEDE LUMBER COMPANY,
BONNERS FERRY LUMBER COMPANY,
DEHLBOM LUMBER COMPANY,
HUMBIRD LUMBER COMPANY,
THE DOVER LUMBER COMPANY,
SANDPOINT LUMBER & POLE COMPANY,
BARBER LUMBER COMPANY,
OVERLAND LUMBER COMPANY,
THE PANHANDLE LUMBER COMPANY,
GEORGE PALMER LUMBER COMPANY,

GRANDE RONDE LUMBER COMPANY,
STODDARD BROTHERS COMPANY,
SHOCKLEY & McMURREN LUMBER COMPANY,
GOODNOUGH MERCANTILE & STOCK COMPANY,
SUMMERVILLE LUMBER COMPANY,
WISCONSIN-OREGON LUMBER COMPANY, and
EMPIRE LUMBER COMPANY,

Complainants,

AGAINST

PETITION.

NORTHERN PACIFIC RAILWAY COMPANY,
GREAT NORTHERN RAILWAY COMPANY,
CHICAGO, BURLINGTON & QUINCY RAILROAD COM-
PANY,
SPOKANE FALLS AND NORTHERN RAILWAY COM-
PANY,
COLUMBIA & RED MOUNTAIN RAILWAY COMPANY,
KOOTENAI VALLEY RAILWAY COMPANY,
RED MOUNTAIN RAILWAY COMPANY,
SOUTHERN PACIFIC RAILWAY COMPANY,
UNION PACIFIC RAILWAY COMPANY,
OREGON SHORT LINE RAILROAD COMPANY,
OREGON RAILROAD & NAVIGATION COMPANY,
CHICAGO & NORTHWESTERN RAILWAY COMPANY,
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COM-
PANY,
CANADIAN PACIFIC RAILWAY COMPANY,
SPOKANE-INTERNATIONAL RAILWAY COMPANY,
COEUR d'ALENE & SPOKANE RAILWAY COMPANY,
SPOKANE & INLAND RAILWAY COMPANY,
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAIL-
WAY COMPANY (Soo Line),
IDAHO & WASHINGTON NORTHERN RAILWAY COM-
PANY, and
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COM-
PANY OF WASHINGTON,

Defendants.

TO THE HONORABLE INTERSTATE COMMERCE COMMISSION:

The above named complainants respectfully show by this, their petition:

I.

That complainants are corporations, individuals and co-partnerships engaged in the lumber business and in the business of manufacturing and selling lumber, timber and forest products in the States of Oregon, Washington and Idaho.

That the mills and factories of a portion of the complainants are located in the eastern portion of Oregon, and the mills and factories of a portion of the complainants are located in the State of Washington east of the Cascade mountains; and the mills and factories of a portion of complainants are located in the State of Idaho.

That complainants are all located and doing business at what are known as interior points as distinguished from Pacific Coast points.

That complainants above named are interested in the sale and transportation of lumber, timber and forest products from the States of Oregon, Washington and Idaho to the States of North Dakota, South Dakota, Minnesota, Iowa, Illinois, Nebraska, Kansas, Missouri, Colorado, and other States.

II.

That defendants are corporations and common carriers of freight and engaged in transporting interstate commerce from the States of Washington and Idaho to the States mentioned in the last preceding paragraph and to other eastern points and States.

III.

That the interstate commerce and business in which the complainants are interested is wholly by rail from the States of Oregon, Washington and Idaho to the States of North Dakota, South Dakota, Minnesota, Iowa, Illinois, Nebraska,

Kansas, Missouri, Colorado, and other States, and the defendants, in connection with other common carriers of freight, haul and transport the lumber, timber and forest products of the complainants to the lumber consuming territories within the States (other than the States of Oregon, Washington and Idaho) above mentioned, and to many destinations in lumber consuming territories within the North Central and Eastern States of the Union.

IV.

That the rates on lumber, timber and forest products were voluntarily fixed by some of the defendants in 1893, and said rates so voluntarily fixed continued until November 1st, 1907.

That on or about the day of September, 1907, the defendants, in connection with other participating carriers, filed with the Interstate Commerce Commission and have published as effective November 1st, 1907, Tariffs Nos. I. C. C. 850 and A-2667 and have also filed a supplement or supplements thereof and thereto, whereby the rates on lumber, timber and forest products from points of shipments by complainants are advanced from three to twelve and a half cents per hundred pounds on said interstate commerce and shipments.

Complainants allege that the defendants have arbitrarily and by a conspiracy between them, purported to fix and establish the rates shown on said tariffs and supplements thereto and have so done in violation of law and the acts of Congress, and said advanced and increased rates are unreasonable and unjust and greatly in excess of a reasonable and fair rate for the services rendered or to be rendered complainants, or either of them.

That there was or is no cause or excuse for the raising of said rates, and in so doing the defendants acted wholly arbitrarily and fixed said rates much greater than the value of the services rendered or to be rendered, and more than the traffic will bear.

V.

Complainants allege that the said rates existing prior to November 1st, 1907, were excessive, exorbitant and unreasonable and more than a fair compensation for the services rendered, complainants or either of them, and complainants allege that they and each of them are entitled to a better rate than existed prior to November 1st, 1907, and that the rate for the territory in which the complainants do business should be at least 10 cents per hundred pounds less than from Pacific Coast points. Complainants allege that the rates which existed from 1893 to November 1st, 1907, from Pacific Coast points were and still are reasonable and fair rates for services rendered, and were and are a reasonable and fair tariff upon lumber, timber and forest products from Pacific Coast points.

That there is no reason for any difference in rates between Minnesota transfer points and Missouri River points and common points.

That from Pacific Coast points lumber, timber and forest products have to be hauled a much greater and longer distance over the same line, in the same direction, under substantially similar circumstances and conditions than the shipments of complainants, and that said Pacific Coast shipments have to be hauled over a mountain range and greater compensation is charged for the same kind of property for the shorter than for the longer haul, the shorter being included within the longer haul.

VI.

That the shipments of complainants are by continuous carriage from various lines and routes wholly by rail and almost entirely to interior points, and the Pacific Coast shipments pass by the mills and factories of many of the complainants herein.

VII.

That the freight rates and charges made upon interstate shipments of complainants are intrinsically and relatively unrea-

sonable, unjust and unlawful, and much in excess of the value of the services rendered or performed.

VIII.

That the manufacture of lumber and other forest products constitutes one of the largest and most important interests in each of the States of Oregon, Washington and Idaho.

That complainants and others engaged in the lumber business in the States of Oregon, Washington and Idaho have invested therein large sums of money, exclusive of materials on hand, standing timber and timber lands. That a large number of persons are directly engaged in and dependent upon said industry within said States and each of them, and there are large pay-rolls incident to said business.

That complainants and others made investments upon the faith that the rates existing prior to November 1st, 1907, would not be increased, but would be decreased.

That the tonnage of lumber has greatly increased in the last few years and furnishes a large proportion of the income of the defendants.

That if the rates effective November 1st, 1907, are continued, many of the complainants will have to cease operation and quit business and will not be able to compete in the markets where they have heretofore been selling their products.

If the rates effective November 1st, 1907, continue, only the higher grades of lumber can be moved, and millions of dollars in value of timber will be annually wasted and millions of dollars of timber have heretofore annually been wasted on account of the excessive and exorbitant rates on forest products.

IX.

That the carriers have greatly prospered upon and from the rates upon lumber, timber and forest products which existed from 1893 to November 1st, 1907.

That many of the defendants, and especially the Union Pacific Railroad Company, Great Northern Railway Company and

the Northern Pacific Railway Company have been more than liberal in paying operating expenses and dividends upon stock from earnings, and after paying operating expenses, dividends, and all fixed charges, said companies and each of them have paid and charged from net earnings large amounts for permanent improvements and betterments.

That the Union Pacific Railroad Company owns and controls the stock of the Oregon Short Line and the Oregon Railroad & Navigation Company. That the Great Northern Railway Company, Northern Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company are practically under one management and control. The Spokane International is the connecting line of the Canadian Pacific Railroad Company and the Soo Line.

X.

That the movement in lumber and forest products is constant and regular and would be greater and larger if defendants would furnish cars; that the said industry is not dependent upon seasons; that rapidity of movement is not necessarily required; that no special equipment is required; that the movement between interstate points is almost wholly in carload lots; that the cars are loaded and partially equipped by the shipper and unloaded by the consignee without expense to the carriers; that the risk of loss or damage in transportation is slight; that lumber is an article of prime utility required to be transported long distances; that it is of large bulk and weight as compared to the value; that under existing rates the cost of transportation to consuming markets in other States in many cases exceeds the value of the forest products.

XI.

The complainants allege that the advance in freight rates effective November 1st, 1907, will greatly injure, and to a large extent destroy the lumber industry in the States of Idaho and the eastern portions of the States of Oregon and Washington.

The advance will amount to from twenty-five to fifty dollars per car on lumber to St. Paul, South Dakota, Missouri River and common points, and all of said advance goes to and will be received by the carriers transporting said products to said points from points of shipment by complainants.

The complainants, in support of their allegations set forth and above referred to, make a part hereof all rate sheets and schedules relating to lumber, timber and forest products from the States of Oregon, Washington and Idaho to other States and on file with the Interstate Commerce Commission, and the annual reports made by the defendants or either of them to the Interstate Commerce Commission.

Wherefore, complainants pray that defendants be required to promptly plead hereto and answer the charges herein; that after due and full hearing and investigation, an order be made commanding said defendants and each of them to wholly desist and cease from the aforesaid violations of the provisions of the acts of Congress to regulate commerce. That upon this complaint a full investigation be made, and such orders be entered as may be necessary to fix and insure the establishment and observance of and by the said defendants of a reasonable and just system of interstate freight rates from the States of Oregon, Washington and Idaho to other States upon lumber, timber and forest products, and such other and further orders as may by this Commission be deemed necessary or proper in the premises.

H. M. STEPHENS,
Attorney for Complainants.

State of Washington,
County of Spokane.—ss.

C. P. Lindsley, being first duly sworn, upon oath deposes and says that he is President of complainant Lindsley Brothers Company, a corporation; that he has read the foregoing com-

plaint and petition and knows the contents thereof, and the same is true as he verily believes.

C. P. LINDSLEY.

Subscribed and sworn to before me this 19th day of November, A. D. 1907.

(Notary Seal)

ERNEST E. SARGEANT,
Notary Public in and for the State of Washington, residing
at Spokane, Wash.

EXHIBIT "B."

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of January, A. D. 1909.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,

Commissioners.

No. 1348.

POTLATCH LUMBER COMPANY, ET AL.

v.

NORTHERN PACIFIC RAILWAY COMPANY ET AL.

This case was fully heard and determined by the Commission and a report and order were made and filed therein. Now comes complainant and petitions for rehearing and permission to file supplemental petition therein for the purpose of now praying for reparation.

In cases 1327, 1329 and 1335, the Commission dealt with complaints against a general advance in rates on lumber from the entire producing territory in the Pacific Northwest, described in the orders in the cases as all points of origin in Oregon, Washington, Idaho, Montana and British Columbia, and prescribed rates to be established in lieu of those that had been established by the carriers and declared that complainants were entitled to reparation on bases stated in the reports.

By supplemental orders of October 13, 1908, the Commission authorized defendants in said cases 1327, 1329 and 1335 to forthwith so pay reparation on all shipments as to which, under the decisions, it was due and required that periodical reports of payments so made should be furnished the Commission.

The Commission has decided that as to shipments originating on the lines of carriers not parties defendant in either of said cases 1327, 1329 and 1335 it will by special informal orders authorize reparation on the bases laid down in those cases.

Said cases 1327, 1329 and 1335 were and are held open for such further proceedings as may be necessary in the matter of reparation. It was not and is not intended that reparation shall be paid only to shippers actually parties to the said cases, but it was and is intended that reparation shall be paid without discrimination to all shippers from points of origin covered by said cases.

Supplemental complaint and petition for rehearing in case 1348, *Potlatch Lumber Company, et al., vs. Northern Pacific Railway Company, et al.*, alleges that defendants therein refuse to pay reparation to shippers from the Spokane district, apparently because such shippers were not parties to cases 1327, 1329 and 1335.

No reparation was prayed for in said case 1348. Complaint in said case 1348 did not bring in issue advanced rates of carriers, but it was a prayer for the establishment of new and higher differentials from Spokane territory under the Coast

rates. It was and is the intention of the Commission that shippers from the Spokane territory shall have reparation under said cases 1327, 1329 and 1335 as well as from any other territory covered thereby; but it was not and is not the intention of the Commission to award additional reparation because of the new differentials fixed in said case 1348. Therefore,

IT IS ORDERED: That the petition for rehearing and the application to file supplemental petition in case No. 1348 be denied, and if any parties thereto are not accorded reparation in accordance with the decisions in said cases 1327, 1329 and 1335 they may file their claims for reparation thereunder.

IT IS FURTHER ORDERED: That a copy of this order be served on all parties to this case.

A true copy.

(Seal)

E. A. MOSELEY,
Secretary.

EXHIBIT C (Copy).

Spokane, Wash., March 1, 1909.

Subject: Lumber Freight Rate Case—Case No. 1348, *Potlatch Lumber Co. et al. v. N. P. Ry. Co. et al.*

Hon. F. M. Cockrell,

Care of Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

Your letter of the 23d ult. received and noted.

Sorry to say that the copies of orders in your letters contained do not to me "fully explain themselves."

At the time I wired you had in my possession copies of these orders and your letter to Mr. Beggs, but did not have Mr. Beggs' letter to the Commission.

I find in the original order in the Coast cases, your decision in part as follows:

“Complainants are entitled to reparation only on account of shipments upon which charges were collected in excess of the rates *between the same points* in effect October 31st, 1907; that in instances in which the rates herein prescribed are not lower than those in effect *between the same points* on October 31, 1907, such reparation should be measured by the difference between the rates actually paid and those herein prescribed; and that in instances in which the rates herein prescribed are lower than the rates in effect *between the same points* on October 31, 1907, such reparation should be measured by the difference between the rates actually paid and *those which were in effect between the same points* on October 31, 1907.”

Doubtless you remember that before the increased rates effective November 1, 1907, there were certain differentials between Coast points and points commencing about twenty-five miles east of Spokane, to Dakota and Minnesota and northerly points; and a five-cent differential between Coast points and all of this territory to Nebraska points.

Under your original order, reparation from this district would and should be based upon rates in effect October 31, 1907 (unless the rates fixed by the Commission are in excess thereof), and the rates effective November 1, 1907, that is, the difference between these two rates from points of shipment to points of destination.

While the shippers from this district feel that this is giving the railroad companies much the best of the situation, and that the shippers should in fact have the difference between the rate fixed by the Commission and the rate actually paid for the last two years, or at least from November 1, 1907, yet they have been content to accept and abide by your original order, being the difference in rate between the points of shipment and the points of destination gauged by the rates in effect October 31, 1907, and November 1, 1907, from and between points of shipment to points of destination (unless the rates fixed by the Commission are in excess thereof).

Your order of January 12, 1909, in case No. 1348 (Potlatch Lumber Company case), sets forth that it is intended that reparation shall be made and "paid without discrimination to all shippers from points of origin."

It seems to the writer hereof impossible to make reparation without discrimination on any other basis than difference in rates on the dates above mentioned between points of shipment and destination and without reference to the rate from any other point than the point of shipment.

Your order of January 12, 1909, states that case No. 1348 did not put in issue the advanced rate of November 1, 1907. This is undoubtedly an inadvertent error on the part of the Commission.

The complaint in No. 1348 sets forth the filing of Tariff No. I. C. C. 850 and A 2667 and supplements thereto and thereof and that the "advanced and increased rates are unreasonable and unjust and greatly in excess of a reasonable and fair rate for services rendered or to be rendered the complainants, or either of them."

It is further alleged in the petition in No. 1348, that the rates existing prior to November 1, 1907, were excessive, exorbitant and unreasonable and more than a fair compensation for the services rendered, and that the complainants were and are entitled to a better rate than existed prior to November 1, 1907. That the rates on lumber from Pacific Coast points prior to November 1, 1907, were and are a reasonable and fair tariff upon lumber from Coast points.

The prayer was that defendants be required to answer the charges, that a hearing be had and that an "order be made commanding said defendants and each of them to wholly desist and cease from the aforesaid violation of the provisions of the acts of Congress;" and that "such orders be entered as may be necessary to fix and insure the establishment and observance of any by the said defendants of a reasonable and just system of interstate freight rates from the States of Oregon, Washington and Idaho to other States upon lumber,

timber and forest products, and such other and further orders as may by this Commission be deemed necessary or proper in the premises."

The evidence in the Coast cases was taken into consideration as a part of case No. 1348, by order of the Commissioner before whom oral testimony in No. 1348 was presented.

Section 13 of the Commerce Act provides and simply requires that the petition state the facts concerning the matters complained of, and does not require any prayer whatever.

Section 16 of the Commerce Act provides "that if, after hearing on the complaint made as provided in Section 136 of the Act, the Commission shall determine that any party is entitled to award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Section 14 of the Act contains a somewhat similar provision.

The writer hereof has been led to believe that the Interstate Commerce Commission does not require compliance with the technical rules of law, and transacts business in an informal rather than a formal way.

Under technical rules of law, any party to an action is entitled to whatever relief the facts show they are entitled to, where defendants have appeared in the action, without reference to the prayer, and the prayer does not (when defendant appears) limit the rights in any manner or respect whatever, so long as relief granted consistent.

16 Ency. Pl. & Pr., pp. 776, 780, 781, 794, 795, 796;

Oteri v. Scalzo, 145 U. S. 589;

Tyler v. Savage, 143 U. S. 98;

Jones v. Van Doren, 130 U. S. 692;

Toyles v. Merchants Fire Ins. Co., 9 Wow. 406;

Boone v. Chiles, 10 Pet. 228;

Watts v. Waddle, 6 Pet. 403;

Dormitzer v. German, etc., Society, 23 Wash. 190, 191;

McKay v. Smith, 27 Wash. 442, 447;
Yarwood v. Johnson, 29 Wash. 643, 649.

Hence I conclude that it is not the intention of the Commission, by technicalities, or otherwise, to defeat any equitable or legal right of the shippers from this district. This result will, however, be done and accomplished, if the original and supplemental orders are construed to mean that reparation is not to be based upon the Coast rates in effect October 31, 1907, and advanced rates from this district effective November 1, 1907.

Unless this matter can be adjusted in response to this letter in accordance with our construction of the original order and what we believe to be even less than the rights and equities of the shippers from this district, we shall then desire to present another petition for rehearing and supplemental or amended complaint upon this reparation question, for we feel deeply and keenly that we will be wronged and that the shippers from this district will be discriminated against and much injured by any other adjustment of reparations than that hereinbefore suggested, to-wit: The difference in rates in effect October 31, 1907, and November 1, 1907, between the shipping points and points of destination, except where and when the rates fixed by the Commission exceed rates in effect October 31, 1907.

If this cannot be done promptly, kindly advise me so that we can arrange to present these petitions to the Commission on March 29th, or any other date after March 24th during the month of March that may seem agreeable to you.

The shippers of this district desire, if possible, to avoid resorting to the courts to recover this reparation, which they feel they are entitled to, and are willing to waive their claims as to difference between rates fixed by Commission and rates in effect October 31, 1907, if the matter can be speedily adjusted by Your Honorable Body. If they are required to go into court, they will, of course, insist upon reparation to the extent

of the rates fixed by the Commission for such period as the law authorizes recovery thereof.

On account of an important lumbermen's meeting here March 9th, shall be greatly pleased if you can consider the subject matter hereof and wire me (at my expense) the result of the Commission's consideration, so as to present the same to said meeting of lumbermen.

Very truly yours,

H. M. STEPHENS.

Exhibit "D."

INTERSTATE COMMERCE COMMISSION.

SUPPLEMENTAL ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of April, A. D. 1909.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS.
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN E. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,

Commissioners.

No. 1327.

OREGON & WASHINGTON LUMBER MANUFACTURERS'
ASSOCIATION, et al.,

vs.

UNION PACIFIC RAILROAD COMPANY, et al.

No. 1329.

PACIFIC COAST LUMBER MANUFACTURERS' ASSO-
CIATION, et al.,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, et al.

No. 1335.

SOUTHWEST WASHINGTON LUMBER MANUFACTUR-
ERS' ASSOCIATION,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, et al.

No. 1348.

POTLATCH LUMBER COMPANY, et al.,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, et al.

The Commission's expressions relative to reparation under its decisions in cases Nos. 1327, 1329, 1335 and 1348 have been interpreted in different ways by shippers and by officials of carriers. For the purpose of giving clear understanding as to the meaning and intent of the Commission and to thus afford a clearly defined and clearly understood basis for the payment of reparation in the cases named,

IT IS ORDERED: That the following be entered as a supplemental order in each of said cases, and that it stand as the ruling and order of the Commission with regard to reparation thereunder, in accord with the original orders in said cases and as same have been modified by further orders of the Commission of October 13, 1908, and January 12, 1909.

Cases Nos. 1327, *Oregon & Washington Lumber Manufacturers' Association et al. v. Union Pacific Railroad Company et al.*; 1329, *Pacific Coast Lumber Manufacturers' Association et al. v. Northern Pacific Railway Company et al.*; 1335, *Southwest Washington Lumber Manufacturers' Association v. Northern Pacific Railway Company et al.*; 1348, *Potlatch Lumber*

Company et al. v. Northern Pacific Railway Company et al., were decided contemporaneously and in connection with each other.

In cases Nos. 1327, 1329 and 1335 reparation was awarded. In case No. 1348 it was specifically stated that no reparation was claimed thereunder.

In order to avoid irreconcilable conflict between the orders in cases Nos. 1327, 1329 and 1335 on the one hand, and case No. 1348 on the other hand, it was necessary to include in the orders in cases Nos. 1327, 1329 and 1335 the requirements in adjusting rates in accordance therewith the differentials prescribed in case No. 1348 should also be observed and established.

It was the intention of the Commission that under cases Nos. 1327, 1329 and 1335 reparation should be awarded only as to shipments upon which charges had been collected in excess of what would have been collected upon the same shipment moving from the same point to the same point under the rates in effect October 31, 1907, except as such rates were changed under supplemental order of September 25, 1908, which authorized new or changed differentials on cedar lumber, shingles, and long timbers, over fir and spruce lumber; that as to a shipment which moved to a point on or west of the imaginary line drawn from Pembina to Port Arthur the reparation should be the difference between the charges collected and what would have been collected under the rates from the same point of origin to the same point of destination under the rates that were in effect on October 31, 1907, except as such rates were changed under supplemental order of September 25, 1908, which authorized new or changed differentials on cedar lumber, shingles, and long timbers, over fir and spruce lumber; that as to a shipment which moved to a point east of the Pembina-Port Arthur line the reparation should be the difference between the charges collected and what would have been collected under the increased rates authorized by the orders in cases Nos. 1327, 1329 and 1335, including any increase that may

have applied under the supplemental order of September 25, 1908, which authorized new or changed differentials on cedar lumber, shingles, and long timbers, over fir and spruce lumber; and that such measure of the reparation on any shipment to any destination should not be either increased or decreased by, or as a result of, additional changes in rates effected by the differentials prescribed in case No. 1348.

In other words, in cases Nos. 1327, 1329 and 1335, we dealt with complaints against increases in rates. Those increases to points on and west of the Pembina-Port Arthur line were condemned in whole, except as new or changed differentials on cedar lumber, shingles, or long timbers, over fir and spruce lumber, were established under authority of the supplemental order of September 25, 1908, and the reparation on each such shipment is to be measured by the full amount of the increase on the shipment over and above the rates in effect between the same points on October 31, 1907, except as new or changed differentials on cedar lumber, shingles, or long timbers, over fir and spruce lumber, were established under authority of the supplemental order of September 25, 1908. The increases in rates to points east of the Pembina-Port Arthur line were condemned in part; increases limited to 5 cents per 100 pounds, and new or changed differentials on cedar lumber, shingles, and long timbers, over fir and spruce lumber, were approved, and reparation on such shipments is to be measured by the amount of increase in rate so authorized.

In case No. 1348 we dealt with a petition for the establishment of new relationships between rates from certain points of origin, and established such relationships to be effective thereafter and not retroactively.

Reparation is, therefore, in all cases to be computed just as if case No. 1348 had not existed or had not been decided.

A true copy.

EDW. A. MOSELY,
Secretary.

Exhibit "E."

BEFORE THE INTERSTATE COMMERCE COMMISSION.

POTLATCH LUMBER COMPANY,	}	SUPPLEMENTAL COMPLAINT.
et al.,		
<i>Complainants,</i>		
vs.		
NORTHERN PACIFIC RAILWAY	}	
COMPANY, et al.,		
<i>Defendants.</i>		

TO THE HONORABLE INTERSTATE COMMERCE COMMISSION:

Come now the complainants in the above entitled action and proceeding and respectfully show to this Honorable Commission by way of Supplemental Complaint:

I.

That since the filing of the decision herein, this Honorable Commission made an order for reparation to and for shippers from the Spokane District, including complainants herein, and that said order for reparation has been misconstrued and misinterpreted and the defendants are refusing to pay reparation as heretofore ordered by this Commission. That the Commission and defendants are construing said order for reparation to mean that reparation is allowed shippers from the Spokane District to points east of the Pembina line fixed by the Commission only to the extent of the difference between the rates paid or charged under the tariff effective November 1, 1907, and the rates from the Coast effective October 31, 1907; whereas, in truth and in fact, this Commission ordered reparation be allowed from points of shipment to points of destination to the extent of the difference between the rates effective

October 31, 1907, and November 1, 1907, between the points of shipment and destination from the Spokane District and all other territory. That defendants are refusing to make or pay reparation on shipments to points east of Pembina line, except to the extent of the difference between the rates effective October 31, 1907, from the Coast and the rates effective November 1, 1907, from the Spokane District, and the Commission seem to be sustaining that view or refusal of defendants.

That complainants presented their supplemental complaint and Petition for Rehearing herein for reparation and application to file and present the same was denied by this Honorable Commission for the reason that an order had theretofore been made for reparation as contended for by complainants.

II.

That since the rate effective November 1, 1907, and since the filing of the Complaint herein, many of the complainants herein have made interstate shipments of lumber and forest products from the States of Washington and Idaho to other States and paid thereon the excessive rates according to the tariffs effective November 1, 1907—I. C. C. No. 850 and I. C. C. No. A-2667.

III.

That many of the complainants are parties by intervention in what are known as the Injunction Suits in Washington and Oregon and made interstate shipments under the provisions and protection of said injunctions which prevented the defendant railway companies from collecting rates in excess of those in effect prior to November 1, 1907; and notwithstanding said injunction, defendants are contending and insisting that complainants may and shall be required to pay greater rates than fixed by the Commission and greater rates than were in effect October 31, 1907.

That the evidence in the Coast cases was considered in this case before this Honorable Body and reparation made to Coast

shippers in accordance with the rates fixed by this Honorable Body in the Coast cases.

V.

That complainants herein, and all shippers in the Spokane District, are entitled to reparation in the same manner and upon the basis of the rates charged and the rates fixed by the Commission in this case.

VI.

That defendants have failed, neglected and refused to graduate differentials in Nebraska as ordered and directed by the Commission.

That defendants have put into effect at practically all points in Nebraska to which forest products move from the Spokane District a rate of 47 cents per hundred pounds; that thereby three-fourths of the area of Nebraska has no graduated differentials at all; that differentials are not properly, or at all, graduated with reference to the traffic moving to Nebraska from Spokane territory.

That defendants, in fixing differentials in Nebraska, have done so arbitrarily and in violation of the order of the Commission.

VII.

That complainants have made and presented herein a second Petition for Rehearing and Application to Amend Original Petition, to which reference is hereby made and the same is made a part hereof and it is prayed that the same be taken as a part hereof and that the hearing of this, complainants second Supplemental Complaint and complainants' second Petition for Rehearing and Application to Amend Original Petition be heard, and the time for hearing the same be fixed, at the same time, and considered and heard together.

WHEREFORE, complainants petition your Honorable Body for an order directing and requiring the defendants, and each of them, to make reparation to the complainants, and each

of them, and all other persons similarly situated, for all excessive freight rates and charges collected by defendants, or either of them, from complainants, or either of them, or any other shipper within what is known as the Spokane District, or elsewhere, and repay to said shippers, and each of them, the excess, if any, collected over and above the rates fixed by the Commission effective October 15, 1908, for such period as the same are not barred by the statute of limitations and the provisions of the Interstate Commerce Law; and that this Honorable Commission make certain, definite and plain its orders for reparation herein so that no further misapprehension or misunderstanding can hereafter be had or exist; that defendants be required to fix and put into effect equitable, fair and proper graduated differentials in Nebraska upon shipments from Spokane territory; and for such other relief and orders as may be meet and proper and equitable in the premises.

H. M. STEPHENS,
Attorney for Complainants.

State of Washington,
County of Spokane.—ss.

T. J. Humbird, being first duly sworn, upon oath deposes and says: That he is the manager of the Humbird Lumber Company, Ltd., a corporation, one of the Complainants herein; that he has read the above and foregoing Supplemental Complaint and knows the contents thereof, and that the same is true, as he verily believes.

T. J. HUMBIRD.

Subscribed and sworn to before me thisday of May, 1909.

Notary Public in and for said County and State, residing at
Spokane, Wash.

Exhibit "F."

BEFORE THE INTERSTATE COMMERCE COMMISSION.

POTLATCH LUMBER COMPANY,
ST. JOE LUMBER COMPANY,
B. R. LEWIS LUMBER COMPANY,
McGOLDRICK LUMBER COMPANY,
LAMB-DAVIS LUMBER COMPANY,
FIDELITY LUMBER COMPANY,
WASHINGTON MILL COMPANY,
ORRIN S. GOOD,
NATIONAL LUMBER COMPANY,
CASCADE LUMBER COMPANY,
SPRINGSTON LUMBER COMPANY,
WM. MUSSER LUMBER & MANUFACTURING COM-
PANY,
PHOENIX LUMBER COMPANY,
STANDARD LUMBER COMPANY,
KARAMIN LUMBER COMPANY,
E. A. HUMPHREY and J. R. HUMPHREY, a co-partnership,
doing business under the name of the ELKHORN SAW
MILLS,
BUCKEYE LUMBER COMPANY,
LINDSLEY BROTHERS COMPANY,
W. H. GERHART-BRADRICK LUMBER COMPANY, a
co-partnership composed of W. H. Gerhart and A. V.
Bradrick,
S. H. & L. LUMBER COMPANY, a co-partnership composed
of J. J. Herlihy, A. W. Lammers and Geo. W. Shaw,
IDAHO POLE COMPANY, a co-partnership composed of
W. L. Beckwith and John H. Fowler,
CHEWELAH MILL COMPANY,
THE REEVES-FARRELL LUMBER COMPANY,
POST FALLS LUMBER & MANUFACTURING COM-
PANY,

LACLEDE LUMBER COMPANY,
BONNERS FERRY LUMBER COMPANY,
DEHLBOM LUMBER COMPANY,
HUMBIRD LUMBER COMPANY,
THE DOVER LUMBER COMPANY,
SANDPOINT LUMBER & POLE COMPANY,
BARBER LUMBER COMPANY,
OVERLAND LUMBER COMPANY,
THE PANHANDLE LUMBER COMPANY,
GEORGE PALMER LUMBER COMPANY,
GRANDE RONDE LUMBER COMPANY,
STODDARD BROTHERS COMPANY,
SHOCKLEY & McMURREN LUMBER COMPANY,
GOODNOUGH MERCANTILE & STOCK COMPANY,
SUMMERVILLE LUMBER COMPANY,
WISCONSIN-OREGON LUMBER COMPANY, and
EMPIRE LUMBER COMPANY,

Complainants,

AGAINST

NORTHERN PACIFIC RAILWAY COMPANY,
GREAT NORTHERN RAILWAY COMPANY,
CHICAGO, BURLINGTON & QUINCY RAILROAD COM-
PANY,
SPOKANE FALLS AND NORTHERN RAILWAY COM-
PANY,
COLUMBIA & RED MOUNTAIN RAILWAY COMPANY,
KOOTENAI VALLEY RAILWAY COMPANY,
RED MOUNTAIN RAILWAY COMPANY,
SOUTHERN PACIFIC RAILWAY COMPANY,
UNION PACIFIC RAILWAY COMPANY,
OREGON SHORT LINE RAILROAD COMPANY,
OREGON RAILROAD & NAVIGATION COMPANY,
CHICAGO & NORTHWESTERN RAILWAY COMPANY,
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COM-
PANY,
CANADIAN PACIFIC RAILWAY COMPANY,

SPOKANE INTERNATIONAL RAILWAY COMPANY,
COEUR D'ALENE & SPOKANE RAILWAY COMPANY,
SPOKANE & INLAND RAILWAY COMPANY,
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE
RAILWAY COMPANY (Soo Line),
IDAHO & WASHINGTON NORTHERN RAILWAY COM-
PANY, and
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COM-
PANY OF WASHINGTON,
Defendants.

No. 1348.

PETITION FOR REHEARING.

TO THE HONORABLE INTERSTATE COMMERCE COM-
MISSION:

Come now the complainants above named and petition this Honorable Body, the Interstate Commerce Commission, for a rehearing in the above entitled proceeding upon the question of refund and reparation, for the reasons and upon the grounds following, to-wit:

I.

That under the decision of this Honorable Body and the rates fixed by it, the complainants are entitled to reparation and refund of the difference and excess paid under the tariffs effective November 1, 1907, and prior thereto, in excess of the rates fixed by this Honorable Body, effective October 15th, 1908, for such period as the same are allowed under the laws of the United States and within the period of limitation therein provided.

II.

That this proceeding was instituted under the direction and supervision of a committee of the Lumbermen's Association of Spokane, Washington, which committee consists of William Deary, who is connected with the Potlatch Lumber Company,

T. J. Humbird, connected with the Humbird Lumber Company, and Jack Reardon, connected with the McGoldrick Lumber Company; that said companies are parties complainant. That at the time the said original petition was prepared and ready for verification, neither of the members of said committee were available to verify the same or to examine the same. That before the preparation of said petition, the said Committee understood that said petition would contain a prayer for reparation and that if the complainants were entitled thereto, reparation would be ordered in this proceeding. That the members of said committee never had any different idea, information or belief, until after the decision in this case was rendered. That the verification herein was made by Mr. C. P. Lindsley, who is not a member of said committee, and that while he read the same before verifying it, he did not do so critically or with a view of analyzing the form of said Petition.

That said Committee at all times understood that the employment of their attorney herein, H. M. Stephens, covered the matter of reparation and that the same would be presented in the original Petition and that the matter of reparation would be one of the questions in the case and be determined by this Honorable Body and an Order made in accordance with the determination thereof; that when said decision was rendered said Committee believed that reparation would still be ordered herein.

III.

That the complainants are informed and believe that their prayer herein is sufficient to warrant an Order for reparation and especially that portion of the prayer which prays for, "Such other and further Orders as may by this Commission be deemed necessary or proper in the premises."

That said Committee are informed and believe that the attorney of complainants informally requested an order allowing reparation herein promptly after notice of said decision.

IV.

That reparation was granted in what is known as the Coast Lumber Cases before this Honorable Body, and it would be inequitable and unjust to not grant to complainants herein reparation, at least to the same extent and in the same way as reparation was granted and ordered in what are usually known and designated as the Coast Lumber Cases, to which cases and Orders therein made, reference is hereby made and prayed to be taken as a part hereof.

V.

The complainants are advised and believe and have been informed that the Railway Companies are willing to make reparation if reparation be ordered or permitted by this Honorable Body.

VI.

That prior to the commencement of this proceeding and prior to the intervention of complainants, or any of them, in what is known as the injunction suit in the United States Court at Seattle, Washington, the defendants, through their agents and representatives, assured many of the complainants and their officers and agents, that voluntary reparation would be made on the basis of the rate fixed by this Honorable Body. That hereto attached and marked "Exhibit A" is the circular of some of the defendants, which circular was gotten out and distributed to and among the public and to and among the complainants herein, at or about the date thereof. That hereto attached and marked "Exhibit B" and "Exhibit C" are copies of telegrams from the traffic departments of what are known as the Hill roads.

VII.

That it would be inequitable and unjust and be denying to complainants herein equal protection of the law to disallow or refuse reparation in this proceeding and grant the same in what are known as the Coast Lumber Cases. And complain-

ants are informed and believe, that under Section 16a of the Interstate Commerce Law and the Rules and Regulations of the Interstate Commerce Commission, that they have the right and privilege of petitioning for a rehearing herein and for a modification of the Order heretofore made herein and complainants are informed and believe that this Honorable Body has ample power in the premises, and especially under Sec. 16 of the Interstate Commerce Act, to make reparation to the complainants and all other shippers in what is known as the Spokane District; that is, to make an Order that the defendants make reparation and refund and repay to the complainants and all other shippers, freight rates and charges heretofore collected upon lumber and other forest products, in excess of the rates fixed by the Interstate Commerce Commission by its decision herein.

That most of the complainants herein intervened in what is known as the Injunction Suit in the Federal Court of the Western District of the State of Washington wherein an injunction was granted against many of the defendants enjoining and restraining many of the defendants from collecting rates in excess of those in effect prior to November 1, 1907, and many of the complainants have shipped under said injunction. Some of the complainants, however, did not intervene in said injunction action, mainly for the reason that the defendants in that action assured the complainants not joining therein that reparation would be made on the same basis to all shippers if the rate effective November 1, 1907, should be reduced, or if any reduction should be made in the rates prior to that date. That it is necessary that an order for reparation be made herein so that the matters in said suit and litigation can be finally and fully adjusted and the said action finally disposed of.

WHEREFORE, Complainants petition your Honorable Body for a rehearing herein and for an Order directing and requiring the defendants, and each of them, to make reparation to the complainants, and each of them, and all other persons sim-

ilarly situated, for all excessive freight rates and charges collected by defendants, or either of them, from complainants, or either of them, or any other shipper within what is known as the Spokane District, and repay to said shippers, and each of them, the excess, if any, collected over and above the rates fixed by this Commission effective October 15, 1908, for such period as the same are not barred by the statute of limitations and the provisions of the Interstate Commerce Law, and for such other relief and Orders as may be meet and proper and equitable in the premises.

H. M. STEPHENS,
Attorney for Complainants.

State of Idaho,
County of Latah.—ss.

WILLIAM DEARY, being first duly sworn, upon oath deposes and says:

That he is the General Manager of the Potlatch Lumber Company, a corporation; that he has read the foregoing Petition for Rehearing and knows the contents thereof and that the same is true as he verily believes.

WILLIAM DEARY.

Subscribed and sworn to before me this 30th day of November, A. D. 1908.

(Seal)

R. S. SMITH,
Notary Public in and for said County and State, residing at
Potlatch, Idaho.

Exhibit A.

SPOKANE INTERNATIONAL RAILWAY CO.
SPOKANE & INLAND RAILWAY CO.
COEUR D'ALENE & SPOKANE RAILWAY CO., LTD.
IDAHO & WASHINGTON NORTHERN RAILROAD.

Spokane, Wash., Dec. 14, 1907.

McGoldrick Lumber Co.,
Cincinnati & O. R. & N. Tracks, City.

Gentlemen :

Referring to the proceedings now pending before the Interstate Commerce Commission between the Lumber Shippers and the Railroads, in which proceeding the reasonableness of the present tariff rates on east-bound lumber shipments are involved, we desire to say that our lines are not parties to suit in which injunction was issued, consequently to comply with the law we are compelled to use the new tariffs effective November 1st, 1907. If, however, the Interstate Commerce Commission decides that the new rates or any part of them are unreasonable, and shall direct or authorize such unreasonable excess to be refunded, we will promptly comply with such order.

GEO. H. MARTIN,
G. F. A., Spokane International Ry. Co.
J. H. LOTHROP,
G. F. A., Spokane & Inland Railway Co.,
Coeur d'Alene & Spokane Railway Co., Ltd.
R. F. BLACKWELL,
Vice-Pres. and Gen. Mgr., Idaho & Washington Northern R. R.

Exhibit B.

Chicago, Ill., Nov. 4-1907.

R. A. Kellogg,

Secretary Western Pine Manufacturers' Association,
Spokane, Washington.

Message third. It is our opinion new lumber rates will not be reduced by Interstate Commerce Commission, in which event final settlement will not give Pacific Coast lumbermen any advantage over you. If the Commission should decide the present rates unreasonable and order a reduction and award a reparation to shippers, it would apply alike to all shippers. Under circumstances, do not see how we could properly make any appeal to the Interstate Commerce Commission that would likely be effectual. If your people take different view of situation, you can intervene in present court proceedings in accordance with Judge Hanford's order.

D. MILLER.

4:26 a. m. 5th.

Exhibit C.

H. N. Kennedy,
Spokane.

St. Paul 11/6

Please advise Kellogg of Western Pine Assn. his message 4th sent me in Chicago just received by mail. Have seen answers made by Q. and G. N. Tell him we understand and greatly regret present situation but do not think it will long continue. Believe new tariff will be held just and reasonable, meantime some question about permanency of Judge Hanford's order and conditions attached thereto are such that shippers are not taking advantage of it to any great extent.

J. G. WOODWORTH.

Exhibit "G."

BEFORE THE INTERSTATE COMMERCE COMMISSION.

POTLATCH LUMBER COMPANY,	}	No. 1348.
et al.,		
<i>Complainants.</i>		
vs.		
NORTHERN PACIFIC RAILWAY	}	
COMPANY, et al.,		
<i>Defendants.</i>		

PETITION FOR REHEARING AND APPLICATION TO
AMEND ORIGINAL PETITION.

Come now the complainants above named and petition this Honorable Body, the Interstate Commerce Commission, for a rehearing in the above entitled proceeding upon the question of refund and reparation, for the reasons and upon the grounds following, to-wit:

I.

That under the decision of this Honorable Body and the rates fixed by it, the complainants are entitled to reparation and refund of the difference and excess paid under the tariffs effective November 1, 1907, and prior thereto, in excess of the rates fixed by this Honorable Body, effective October 15th, 1908, for such period as the same are allowed under the laws of the United States and within the period of limitation therein provided.

II.

That this proceeding was instituted under the direction and supervision of a committee of the Lumbermen's Association of Spokane, Washington, which committee consists of William Deary, who is connected with the Potlatch Lumber Company,

T. J. Humbird, connected with the Humbird Lumber Company, and Jack Reardon, connected with the McGoldrick Lumber Company; that said companies are parties complainant. That at the time the said original petition was prepared and ready for verification, neither of the members of said committee were available to verify the same or to examine the same. That before the preparation of said petition, the said committee understood that said petition would contain a prayer for reparation and that if the complainants were entitled thereto, reparation would be ordered in this proceeding. That members of said committee never had any different idea, information or belief, until after the decision in this case was rendered. That the verification herein was made by Mr. C. P. Lindsley, who is not a member of said committee, and that while he read the same before verifying it, he did not so do critically or with a view of analyzing the form of said petition.

That said committee at all times understood that the employment of their attorney herein, H. M. Stephens, covered the matter of reparation and that the same would be presented in the original petition and that the matter of reparation would be one of the questions in the case and be determined by this Honorable Body and an order made in accordance with the determination thereof; that when said decision was rendered said committee believed that reparation would still be ordered herein.

III.

That the complainants are informed and believe that their prayer herein is sufficient to warrant an order for reparation and especially that portion of the prayer which prays for, "such other and further orders as may by this Commission be deemed necessary or proper in the premises."

That said committee are informed and believe that the attorney of complainants informally requested an order allowing reparation herein promptly after notice of said decision.

IV.

That reparation was granted in what is known as the Coast Lumber Cases before this Honorable Body, and it would be inequitable and unjust to not grant to complainants herein reparation, at least to the same extent and in the same way as reparation was granted and ordered in what are usually known and designated as the Coast Lumber Cases, to which cases and orders therein made, reference is hereby made and prayed to be taken as a part hereof.

V.

That complainants are advised and believe and have been informed that the Railway Companies are willing to make reparation to the extent of the difference between the rates effective October 31, 1907, and the rates charged, paid or collected under the advanced rates effective November 1, 1907, between points of shipment and destination from the Spokane District if ordered so to do by this Honorable Body.

That this Honorable Body has made an order for reparation which seems to have been misconstrued by the defendants and the defendants are insisting that this Commission has only allowed reparation east of the Pembina line fixed by the Commission to the extent of the difference between Coast rates effective October 31, 1907, and the rates paid under the new rate effective November 1, 1907. That in many instances under the tariffs in effect October 31, 1907, and prior thereto, different rates existed from the territory a short distance east of Spokane and there was also a difference in rates between the Spokane District and the Coast territory to all Nebraska points on October 31, 1907.

VI.

That prior to the commencement of this proceeding and prior to the intervention of complainants, or any of them, in what is known as the Injunction Suit in the United States Court at Seattle, Washington, the defendants, through their

agents and representatives, assured many of the complainants and their officers and agents, that voluntary reparation would be made on the basis of the rate fixed by this Honorable Body. That hereto attached and marked "Exhibit A" is the circular of some of the defendants, which circular was gotten out and distributed to and among the public and to and among the complainants herein, at or about the date thereof. That hereto attached and marked "Exhibit B" and "Exhibit C" are copies of telegrams from the traffic departments of what are known as the Hill roads.

VII.

That it would be and is inequitable and unjust and would be and is denying to complainants herein due process of law and denying equal protection of the law to disallow or refuse reparation in this proceeding in any way different than is allowed in what is known as the Coast Lumber Cases; that is, the difference between points of shipment and destination under the rates in effect October 31, 1907, and that which was collectible or paid or charged under the advanced rate effective November 1, 1907; and complainants believe and insist that they are in fact entitled to reparation to the amount of the difference between the rates fixed by the Commission and those chargeable or collectible under the advanced rate effective November 1, 1907, except, of course, in instances where the Commission fixed a higher rate than was in effect October 31, 1907. Complainants allege that the original order allowing reparation in the Coast Cases, and which order the Commission has directed should be applied to the shippers from Spokane District, allows and permits reparation based upon rates from points of shipment to destination and not upon any arbitrary or imaginary rate or rates which were not in effect or established and which never did exist and do not now exist. And complainants are informed and believe, that under Section 16a of the Interstate Commerce Law and the Rules and Regulations of the Interstate Commerce Commission, that they

have the right and privilege of petitioning for a rehearing herein and for a modification of the orders heretofore made herein and complainants are informed and believe that this Honorable Body has ample power in the premises, and especially under Section 16a of the Interstate Commerce Act, to make reparation to the complainants and all other shippers in what is known as the Spokane District; that is, to make an order that the defendants make reparation and refund and repay to the complainants and all other shippers, freight rates and charges heretofore collected upon lumber and other forest products in excess of the rates fixed by the Interstate Commerce Commission by its decision herein.

VIII.

That if it be desirable or necessary in order to grant the prayer of this Petition and to grant the relief herein prayed for and to order reparation and refund as herein prayed for, that complainants be allowed to amend their original Petition by specifically praying for refund and reparation.

WHEREFORE, complainants petition your Honorable Body for a rehearing and for an order directing and requiring the defendants, and each of them, to make reparation to the complainants, and each of them, and all other persons similarly situated, for all excess in freight rates and charges collected by defendants, or either of them, from complainants, or either of them, or any other shipper within what is known as the Spokane District, and repay to said shippers, and each of them, the excess, if any, collected over and above the rates fixed by this Commission effective October 15, 1908, for such period as the same are not barred by the statute of limitations and the provisions of the Interstate Commerce Law; that if it be desirable or necessary in order to grant the prayer of this Petition and to grant the relief herein prayed for and to order reparation and refund as herein prayed for, that complainants be allowed to amend their original Petition by specifically praying for refund and reparation; and for such

other relief and orders as may be meet and proper and equitable in the premises.

H. M. STEPHENS,
Attorney for Complainants.

State of Washington,
County of Spokane.—ss.

T. J. Humbird, being first duly sworn, upon oath deposes and says: That he is the General Manager of the Humbird Lumber Company, Ltd., a corporation, one of the complainants herein, that he has read the foregoing Petition for Rehearing and Application to Amend Original Petition, knows the contents thereof, and that the same is true as he verily believes.

T. J. HUMBIRD.

Subscribed and sworn to before me this day of April,
A. D. 1909.

H. M. STEPHENS,
Notary Public in and for said County and State, residing at
Spokane, Wash.

Exhibit A.

SPOKANE INTERNATIONAL RAILWAY CO.
SPOKANE & INLAND RAILWAY CO.
COEUR D'ALENE & SPOKANE RAILWAY CO., LTD.
IDAHO & WASHINGTON NORTHERN RAILROAD.

Spokane, Wash., Dec. 14, 1907.

McGoldrick Lumber Co.,

Cincinnati & O. R. & N. Tracks, City.

Gentlemen:

Referring to the proceedings now pending before the Interstate Commerce Commission between the Lumber Shippers and the Railroads, in which proceeding the reasonableness of the

present tariff rates on east-bound lumber shipments are involved, we desire to say that our lines are not parties to suit in which injunction was issued, consequently to comply with the law we are compelled to use the new tariffs effective November 1st, 1907. If, however, the Interstate Commerce Commission decides that the new rates or any part of them are unreasonable, and shall direct or authorize such unreasonable excess to be refunded, we will promptly comply with such order.

GEO. H. MARTIN,

G. F. A., Spokane & Inland Railway Co.

J. H. LOTHROP,

G. F. A., Spokane & Inland Railway Co.,

Coeur d'Alene & Spokane Railway Co., Ltd.

R. F. BLACKWELL,

Vice-Pres. and Gen. Mgr., Idaho & Washington Northern R. R.

Exhibit B.

Chicago, Ill., Nov. 4-1907.

R. A. Kellogg,

Secretary Western Pine Manufacturers' Association,
Spokane, Wash.

Message third. It is our opinion new lumber rates will not be reduced by Interstate Commerce Commission in which event final settlement will not give Pacific Coast lumbermen any advantage over you. If the Commission should decide the present rates unreasonable and order a reduction and award a reparation to shippers, it would apply alike to all shippers. Under circumstances, do not see how we could properly make any appeal to the Interstate Commerce Commission that would likely be effectual. If your people take different view of situation, you can intervene in present court proceedings in accordance with Judge Hanford's order.

D. MILLER.

4:26 am. 5th.

Exhibit C.

St. Paul 11/6.

H. N. Kennedy,
Spokane.

Please advise Kellogg of Western Pine Assn. his message sent me in Chicago just received by mail. Have seen answers made by Q. and G. N. Tell him we understand and greatly regret present situation but do not think it will long continue. Believe new tariff will be held just and reasonable, meantime some question about permanency of Judge Hanford's order and conditions attached thereto are such that shippers are not taking advantage of it to any great extent.

J. G. WOODWORTH.

Indorsed. Stipulation. Filed U. S. Circuit Court, Western District of Washington, Feb. 18, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*United States Circuit Court, Western District of Washington,
Northern Division.*

<p>GREAT NORTHERN RAILWAY COMPANY, a corporation,</p>	}	<p><i>Plaintiff,</i></p>
<p>vs.</p>		
<p>FIDELITY LUMBER COMPANY, a corporation,</p>	}	<p><i>Defendant.</i></p>

No. 1948.
Filed April 15, 1911.

MEMORANDUM DECISION ON THE MERITS.

This action is collateral and supplementary to the litigation between lumber manufacturers and the railroad corporations operating in the states of Oregon, Washington, Montana and

Idaho, resulting from an attempt of the railroad companies to raise freight rates on lumber and forest productions in the year 1907. See 165 Fed. Rep. pages 1-12. The defendant in the present action was an intervener in that suit and obtained an injunction restraining the collection of freight on lumber shipments pending the litigation, in excess of the rate in effect prior to November 1, 1907, by compliance with the order of the Court requiring an injunction bond. The bond which was given obligated this defendant to pay the carriers the difference, if any, between the amount paid for transportation of lumber at the old rate and the rate finally established as the rate lawfully chargeable on and after November 1, 1907. The plaintiff, being one of the carriers affected by the injunction and entitled to the protection of the bond, performed service by the transportation of lumber for this defendant, eastward from points of shipments within the territory comprised in the Spokane district, which district is defined in the manner hereinafter to be shown. The object of this action is to collect from the defendant an amount claimed to be, the difference between the freight actually paid and the rate lawfully chargeable as finally established by the litigation for the transportation of lumber on and after November 1, 1907. The parties have by stipulation waived a jury and submitted the case to the Court for its decision on the pleadings, an agreed statement of facts, and briefs after an oral argument.

The injunction which this Court granted in cause No. 1565 was intended to maintain the *status quo* until the controversy as to freight rates on lumber between the lumber manufacturers of the Northwestern states and the railroads furnishing transportation facilities for their products, could be finally adjudicated after the Interstate Commerce Commission had determined the disputed questions as to the rates which might be reasonably and lawfully exacted. The carriers were not forbidden to charge the rates prescribed by their new tariffs intended to be effective on and after November 1, 1907, but were not permitted to *exact payment* of any part of said rate in excess of the

old rate in effect immediately previous to that date and as a condition of granting the injunction, the shippers of lumber were required to obligate themselves to pay the difference between the old rate and the new rate if the latter should be finally determined to be a lawful rate, or any lesser rate which might be established as the lawful rate by the Interstate Commerce Commission, or this court. Having assumed that obligation, this defendant made shipments of lumber on which the freight was paid at the old rate. The controversy as to rates was submitted to the Interstate Commerce Commission and that tribunal determined the matter in decisions and orders published in 14 Int. Com. Com. Rep. pages 1 to 60, and 16 Int. Com. Com. Rep. pages 465 to 468. As a basis for making its decision the Interstate Commerce Commission divided the territory within which lumber shipments originated, into three parts, the first being the Coast Division, comprising territory west of the summit of the Cascade range of mountains; the second being the eastern slope of the Cascade range; and the third designated herein as the Spokane District, (the City of Spokane being located centrally therein,) comprising territory east of the second division and it also drew an imaginary divisional line extending from Pembina, North Dakota, southward through designated points to Port Arthur in the State of Texas. The contentions of the shippers from the different divisions of territory were separately presented to the Interstate Commerce Commission but decided simultaneously and by a uniform rule. The shippers from the Spokane District which includes this defendant, not only opposed the increase of rates but also demanded a substantial reduction of rates on their shipments, by way of a differential from the rates on shipments from points within the Coast Division. The decisions of the Interstate Commerce Commission in practical results, amounted to a restoration of the old rate prevailing prior to November 1, 1907, on all shipments to points west of the Pembina, Port Arthur Line and prescribed a new rate higher than the old rate but less than the new rate, prescribed by the carriers in their schedules filed to be effective after

November 1, 1907, and shippers from the districts east of the Cascade Mountains were allowed differentials cutting the old rate for service in transportation of their lumber to points west of the Pembina, Port Arthur line, and making the increased rate on their shipments to points east of said line less than the increased rate on shipments from points within the Coast Division. The report of the Interstate Commerce Commission contains the following statement: "While permitting some rates to be increased this adjustment also reduces some rates below what they were immediately prior to the increase complained of." I am unable to discover any reduction below the old rates other than that effected by the allowance of differentials on shipments from points east of the Cascade Mountains to points west of the Pembina line. The Interstate Commerce Commission allowed reparation to shippers from the Coast points who were supposed to have paid on shipments pending the litigation in excess of the rates which were in effect on October 31, 1907, but refused to allow reparation to shippers from points within the Spokane District and this apparent discrimination is the ground upon which this defendant resists the demand for an additional payment on account of its shipments. The real issue to be decided is defined by the defendant's answer as follows: "The shippers and interveners contend that no greater rate can be charged than that fixed by the Commission from point of shipment to point of destination, and plaintiff herein contends that it is entitled to collect from said shippers and interveners the Pacific Coast rate for shipments made from points in Eastern Washington and Northern Idaho to points east of the Pembina line, between November 1, 1907, and the date when the Interstate Commerce Commission fixed and determined the rates to be charged by the plaintiff and other carriers."

For the decision of this case in view of the action of the Interstate Commerce Commission, the Court must have in mind six different rates which for convenience will be referred to as Tariffs numbers one to six as follows:

Tariff 1. The old rate in effect prior to November 1, 1907.

Tariff 2. The increased rate per schedule filed by the railroad companies to be in effect on and after November 1, 1907.

Tariff 3. The old rate restored by the Interstate Commerce Commission, applicable to shipments from points in the Coast Division to points west of the Pembina, Port Arthur line.

Tariff 4. The increased rate modified by the Interstate Commerce Commission applicable to shipments from points in the Coast Division to points east of the Pembina, Port Arthur line.

Tariff 5. The differential rate applicable to shipments from points east of the Cascade Mountains to points west of the Pembina, Port Arthur line.

Tariff 6. The differential rate applicable to shipments from points east of the Cascade Mountains to points east of the Pembina, Port Arthur line.

Tariffs 5 and 6 were made effective on and after October 15, 1908.

The restored rate and the modified increased rate, per Tariffs 3 and 4 were made effective on and after November 1, 1907.

Reparation allowed by the Interstate Commerce Commission was only on account of shipments upon which charges were collected in excess of the rate in effect on October 31, 1907; specifically as follows:

“In instances in which the rates herein prescribed are not lower than the rates which were in effect between the same points on October 31, 1907, such reparation should be measured by the difference between the rates actually paid and those herein prescribed; and that in instances in which the rates herein prescribed are lower than the rates which were in effect between the same points on October 31, 1907, such reparation should be measured by the difference between the rates actually paid and those which were in effect between the same points on October 31, 1907.”

So far as the litigants in this court were affected, there could be no drawback of money paid, because, the injunction protected them pending the litigation and they actually paid only the rates per Tariff 1 and they were obligated by the conditions imposed

by the Court in granting the injunction, to pay on shipments made during the pendency of the litigation, the difference between the modified increased rate per Tariff 4 and the old rate per Tariff 1. The apparent discrimination against shippers from points within the Spokane District suggested by the defendant disappears when the facts are illustrated by ciphering. The theory of the defense appears to be that the differential rates prescribed by the Interstate Commerce Commission should have been made effective during the period of litigation so that shippers from the Spokane District should be entitled to reclaim the amount actually paid on their shipments to points west of the Pembina, Port Arthur line in excess of the differential rate per Tariff 5, and that the amount of such excess should stand as an equitable set-off against the excess above the old rate per Tariff 1, on shipments to points east of the Pembina, Port Arthur line; and have the benefit of the differential rate per Tariff 6 as to such shipments. This theory is obviously untenable, because, the Interstate Commerce Commission allowed no such drawback to any shipper. If the defendant had paid the rates per Tariff 2, it would have a just claim for reparation equal to the difference between the amount paid and the modified increased rate per Tariff 4, but there is no such difference because it has only paid according to the old rate per Tariff 1.

It is the opinion of the Court that the Interstate Commerce Commission, in the exercise of lawful authority, made the modified increased rates per Tariffs 3 and 4 effective on and after November 1, 1907, in lieu of Tariff 2, and made the differential rates applicable only to transactions subsequent to the time of making that change in the pre-existing rates. It is also the opinion of the Court that, by the conditions imposed by the Court in granting the injunction and the terms of the injunction bond, the defendant is precluded from exacting any drawback on account of freight paid for shipments made prior to the determination by the Interstate Commerce Commission of the controversy, and that the modified increased rate per Tariff 4, is the lawful rate which the defendant became obligated to pay.

By the stipulated facts, it appears that the amount due to the plaintiff is \$2,805.65, and the Court directs that a judgment be entered in favor of the plaintiff for that amount with legal interests and taxable costs.

C. H. HANFORD, Judge.

Indorsed: Memorandum Decision on the Merits. Filed U. S. Circuit Court Western District of Washington, Apr. 15, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

GREAT NORTHERN RAILWAY COMPANY, a corporation,	} No. 1948.
<i>Plaintiff,</i>	
vs.	
FIDELITY LUMBER COMPANY, a corporation,	
<i>Defendant.</i>	

SUPPLEMENTAL STIPULATION.

It is hereby stipulated and agreed that this suit involves shipments east of what is designated as the Pembina line in the decisions of the Interstate Commerce Commission.

It is agreed that on all shipments made by defendant it paid the rate in effect October 31, 1907.

It is agreed that from the date of the order of the Commission in the Potlatch Company case, the rate as to all shipments thereafter made was fixed at two cents per hundred pounds in

excess of the rate paid and in excess of the rate in effect October 31, 1907.

F. V. BROWN,
F. G. DORETY,
Attorneys for Plaintiff.
H. M. STEPHENS,
Attorney for Defendant.
By E. E. SARGEANT.

Indorsed: Supplemental Stipulation. Filed U. S. Circuit Court, Western District of Washington, July 5, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*United States Circuit Court, Western District of Washington,
Northern Division.*

GREAT NORTHERN RAILWAY COMPANY, a corporation,	}	No. 1948.
Plaintiff,		
vs.		
FIDELITY LUMBER COMPANY, a corporation,	}	
Defendant.		

FINDINGS AND CONCLUSIONS.

The above entitled action coming on to be heard this 21st day of February, A. D. 1911, F. G. Dorety and James B. Kerr appearing for the plaintiff and H. M. Stephens appearing for the defendant, and it appearing that all of the issues raised by the pleadings herein have been stipulated and agreed to by the parties hereto, the court now finds the facts in this case to be as set forth in the stipulations of fact on file herein.

Dated this 6th day of July, A. D. 1911.

C. H. HANFORD, Judge.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing, the Court finds that the plaintiff is entitled to judgment against the defendant in the sum of Two Thousand Eight Hundred Five and Sixty-five One-hundredths (\$2,805.65) Dollars, together with its costs and disbursements to be taxed and inserted in the judgment.

Dated this 6th day of July, A. D. 1911.

By the Court:

C. H. HANFORD, Judge.

Defendant's exception allowed.

C. H. HANFORD, Judge.

We hereby acknowledge service of the foregoing Findings and Conclusions, and the receipt of a true copy thereof, this..... day of July, 1911.

Attorneys for Defendant.

Indorsed: Findings and Conclusions. Filed U. S. Circuit Court, Western District of Washington, July 6, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*United States Circuit Court, Western District of Washington,
Northern Division.*

GREAT NORTHERN RAILWAY COMPANY, a corporation,	}	No. 1948.
<i>Plaintiff,</i>		
vs.		
FIDELITY LUMBER COMPANY, a corporation,	}	
<i>Defendant.</i>		

JUDGMENT.

This action having come on regularly to be heard on the 21st of February, James B. Kerr and F. G. Dorety appearing for the

plaintiff, and H. M. Stephens appearing for the defendant, and the Court having made its findings and conclusions herein in favor of the plaintiff.

Now, therefore, it is ordered, adjudged and decreed that the plaintiff have and recover judgment against the defendant in the full sum of Two Thousand Eight Hundred Five and Sixty-five One-hundredths (\$2,805.65) Dollars, together with its costs and disbursements herein in the sum of \$10.00.

Dated this 6th day of July, A. D. 1911.

By the Court:

C. H. HANFORD, Judge.

Indorsed: Judgment. Filed U. S. Circuit Court, Western District of Washington, July 6, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*United States Circuit Court, Western District of Washington,
Northern Division.*

GREAT NORTHERN RAILWAY COMPANY, a corporation,	} No. 1948.
<i>Plaintiff,</i>	
vs.	
FIDELITY LUMBER COMPANY, a corporation,	}
<i>Defendant.</i>	

PETITION FOR WRIT OF ERROR.

To the Honorable Judges of the Circuit Court:

Comes now the above named defendant, by its attorney, and complains that in the records and proceedings had in the above entitled cause and also in the rendition of the judgment therein in the above named court at the.....term, A. D. 1911,

against said defendant and in favor of the plaintiff, manifest error hath happened to the prejudice of said defendant.

Wherefore said defendant prays for an allowance of a writ of error and for an order fixing the amount of bond for a super-sedeas in said cause, and for such other orders and process as may cause the same to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit, and that upon the giving of such security all other proceedings in this court be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals; and defendant hereby prays an order allowing said defendant to prosecute a writ of error to the said Circuit Court of Appeals.

Dated this 20th day of July, A. D. 1911.

H. M. STEPHENS,
Attorney for Defendant.

Indorsed: Petition for Writ of Error. Filed U. S. Circuit Court, Western District of Washington, June 22, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*United States Circuit Court, Western District of Washington,
Northern Division.*

GREAT NORTHERN RAILWAY COMPANY, a corporation,	}	No. 1948.
<i>Plaintiff,</i>		
vs.		
FIDELITY LUMBER COMPANY, a corporation,		
<i>Defendant.</i>		

ORDER ALLOWING WRIT OF ERROR AND FIXING BOND.

Upon motion of the attorney for the above named defendant, and upon filing a petition for writ of error and an assignment

of errors, it is ordered that a writ of error be and the same is hereby allowed to the Circuit Court of Appeals for the Ninth Circuit, to have review in said Circuit Court of Appeals of judgment and orders heretofore made, rendered and entered in the above entitled action, and that the amount of bond on said writ of error be and the same is hereby fixed at two hundred dollars (\$200.00), the said bond so executed to operate as a bond for costs of appeal, damages and interest.

Done in open court this 22d day of July, A. D. 1911.

C. H. HANFORD, Judge.

Indorsed: Order Allowing Writ of Error and Fixing Bond. Filed U. S. Circuit Court, Western District of Washington, July 22, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*United States Circuit Court, Western District of Washington,
Northern Division.*

GREAT NORTHERN RAILWAY	}	No. 1948.
COMPANY, a corporation,		
<i>Plaintiff,</i>		
vs		
FIDELITY LUMBER COMPANY, a	}	
corporation,		
<i>Defendant.</i>		

ASSIGNMENT OF ERRORS.

Comes now the defendant in the above entitled action, and makes and files the following assignment of errors upon which it will rely for the prosecution of writ of error in the above entitled action, to-wit:

I.

That the United States Circuit Court in and for the Western District of Washington, holding terms at Seattle, erred in rendering judgment for the plaintiff Great Northern Railway Company.

II.

The said Court erred in rendering judgment for any amount in excess of two-fifths of the amount sued for.

III.

The said Court erred in its conclusions of law, to the effect, and holding, that plaintiff is entitled to judgment herein.

IV.

The said Court erred in not holding and determining that plaintiff was entitled to recover not to exceed two-fifths of the amount sued for.

V.

The said Court erred in holding that plaintiff was entitled to judgment for anything in excess of the rates fixed by the Interstate Commerce Commission, to-wit, forty-two cents per hundred pounds, from point of shipment in this action to points of destination.

VI.

The Court erred in not determining that it would be depriving the defendant of its property without due process of law, to require it to pay an unjust and unreasonable rate, or any rate in excess of that fixed by the Interstate Commerce Commission as to future rates.

VII.

The said Court erred in holding that for reparation purposes the Interstate Commerce Commission fixed the Pacific Coast rate to points of destination of shipments involved in

this action, which Pacific Coast rate is fixed for a distance of more than four hundred miles more haul, as compared with the haul from the point of shipment to points of destination involved in this action.

VIII.

The said Court erred in not holding that it was beyond the power of the Interstate Commerce Commission not to allow reparation on the basis fixed as reasonable rates by the Interstate Commerce Commission.

IX.

Said Court erred in not holding that reparation must be upon the basis of a reasonable rate, and erred in not holding that the reasonable rate for reparation must either have been the rate in effect October 31, 1907 (prior to the effective date of the proposed advanced rates which were condemned by the Commission), or the rate fixed by the Interstate Commerce Commission.

X.

The said Court erred in reaching the conclusion of law and rendering judgment for the plaintiff herein, because the judgment and the result thereof is the taking of the property of the defendant without due process of law, and the effect of the judgment rendered by the Court is that defendant is required thereby (if the same be not reversed) to pay an illegal, unreasonable, unjust and unlawful freight rate upon the shipments involved in this action.

Wherefore the defendant, and plaintiff in error, prays that the judgment of the Circuit Court of the United States for the Western District of Washington, holding terms at Seattle, be reversed, and that said Circuit Court be directed to grant a new trial of said case and to render and enter judgment herein against defendant, for a sum not exceeding two-fifths of the amount sued for herein; and prays for such disposition of this

action as may be made in accordance with law and the statutes of the United States in such cases made and provided.

And the defendant, and plaintiff in error, will ever pray.

H. M. STEPHENS,

Attorney for Defendant and Plaintiff in Error.

Indorsed: Assignment of Errors. Filed U. S. Circuit Court, Western District of Washington, July 22, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*United States Circuit Court, Western District of Washington,
Northern Division.*

GREAT NORTHERN RAILWAY COMPANY, a corporation,	}	No. 1948.
<i>Plaintiff,</i>		
vs.		
FIDELITY LUMBER COMPANY, a corporation,		
<i>Defendant.</i>		

BOND ON WRIT OF ERROR.

Know all men by these presents, that we, Fidelity Lumber Company, a corporation, as principal, and *The United States Fidelity & Guaranty Company, a corporation, of Baltimore, Md.*, as surety, are held and firmly bound unto the Great Northern Railway Company, a corporation, plaintiff above named, in the sum of Two hundred dollars (\$200.00), to be paid to the said Great Northern Railway Company, a corporation, its successors and assigns, to and for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, and each thereof, jointly and severally and firmly by these presents.

Sealed with our seals, and dated this 21st day of July, A. D. 1911.

Whereas the above named defendant has sued out a writ of error to the United States Circuit Court of Appeals, Ninth Circuit, to reverse the judgment in the above entitled cause, made, rendered and entered by the Circuit Court of the United States for the Western District of Washington, holding terms at Seattle.

Now, therefore, the condition of this obligation is such that if the above named defendant and plaintiff in error shall prosecute said writ to effect, shall prosecute said writ to effect and answer and pay all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

FIDELITY LUMBER COMPANY,

By H. M. STEPHENS,

Its Attorney.

THE UNITED STATES FIDELITY & GUARANTY
COMPANY.

(Seal)

By W. H. WINFREE,

Its Attorney in Fact.

THE UNITED STATES FIDELITY & GUARANTY
COMPANY,

By J. GRIER LONG,

Its Attorney in Fact.

Approved July 22, 1911.

C. H. HANFORD, Judge.

Indorsed: Bond on Writ of Error. Filed U. S. Circuit Court, Western District of Washington, July 22, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*United States Circuit Court, Western District of Washington,
Northern Division.*

GREAT NORTHERN RAILWAY COMPANY, a corporation,	}	No. 1948.
<i>Plaintiff,</i>		
vs.		
FIDELITY LUMBER COMPANY, a corporation,		
<i>Defendant.</i>		

WRIT OF ERROR.

United States of America, ss.

*The President of the United States to the Honorable Judges of
the Circuit Court of the United States for the Western Dis-
trict of Washington, Greeting:*

Because, in the records and proceedings, as also in the rendition of the judgment, of a plea which is in said Circuit Court before you, between Great Northern Railway Company, a corporation, plaintiff (defendant in error), and Fidelity Lumber Company, a corporation, defendant (plaintiff in error), manifest error hath happened, to the great damage and prejudice of the said defendant (plaintiff in error), as by its complaint and petition appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and plainly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as to have the same at the City of San Francisco in the State of California, on the

.....day of, A. D. 1911, that the record and proceedings aforesaid, being inspected in said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 22nd day of July, A. D. 1911, and of the independence of the United States 136.

(Seal)

SAM'L D. BRIDGES,

Clerk of the United States Circuit Court for the Western District of Washington.

By R. M. HOPKINS, Deputy Clerk.

Allowed by

C. H. HANFORD, District Judge.

Indorsed: No. 1948. United States Circuit Court, Western District of Washington, Northern Division. Great Northern Railway Company, a corporation, Plaintiff, vs. Fidelity Lumber Company, a corporation, Defendant. Writ of Error. Filed U. S. Circuit Court, Western District of Washington, July 22, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy. H. M. Stephens, 409 Peyton Block, Spokane, Washington, Attorney for Defendant.

*United States Circuit Court, Western District of Washington,
Northern Division.*

GREAT NORTHERN RAILWAY COMPANY, a corporation,	}	No. 1948.
<i>Plaintiff,</i>		
vs.		
FIDELITY LUMBER COMPANY, a corporation,		
<i>Defendant.</i>		

CITATION AND RETURN.

United States of America, ss.

*The President of the United States to Great Northern Railway
Company, F. V. Brown and Frederic G. Dorety, its attor-
ney, Greeting:*

You and each of you are hereby cited and admonished to be and appear at and in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco in the state of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, at Seattle, wherein the Great Northern Railway Company is plaintiff in the action and defendant in error, and the Fidelity Lumber Company is defendant in the action and plaintiff in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the

Supreme Court of the United States, this 22nd day of July, A. D. 1911, and of the independence of the United States 136.

(Seal)

C. H. HANFORD,

United States District Judge, presiding in the Circuit Court
of the United States for the Western District of Washington.

Attest:

SAM'L D. BRIDGES, Clerk.

By R. M. HOPKINS, Dep. Clerk.

United States of America,
Western District of Washington.—ss.

I hereby certify that I served the within citation upon F. V. Brown, at Seattle, Washington, being in the Northern Division of the within and above named United States Circuit Court, on the 29th day of July, A. D. 1911, by then and there delivering to him personally a true copy of the within citation.

Dated this 29th day of July, A. D. 1911.

JOSEPH R. H. JACOBY,

United States Marshal.

Marshal's fees, \$2.12-100.

By GEO. B. DEVENPECK, Deputy.

No. 1948. United States Circuit Court, Western District of Washington, Northern Division. Great Northern Railway Company, a corporation, Plaintiff, vs. Fidelity Lumber Company, a corporation, Defendant. Citation and Return. Filed U. S. Circuit Court, Western District of Washington, July 31, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy. H. M. Stephens, 409 Peyton Block, Spokane, Washington, Attorney for Defendant.

*United States Circuit Court, Western District of Washington,
Northern Division.*

GREAT NORTHERN RAILWAY COMPANY, a corporation, <i>Plaintiff (and defendant in error),</i>	}	No. 1948.
vs.		
FIDELITY LUMBER COMPANY, a corporation, <i>Defendant (and plaintiff in error).</i>		

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above named Court:

Please make out and send to the Circuit Court of Appeals copies of the following matters and things in the above mentioned case, to-wit:

1. Complaint.
2. Answer.
3. Stipulation of facts.
4. Decision of Court.
5. Supplemental stipulation of facts.
6. Finding of facts and conclusions of law.
7. Judgment.
8. Petition for writ of error.
9. Order allowing writ of error and fixing bond.
10. Assignment of errors.
11. Bond on writ of error.
12. Writ of error.
13. Citation and return of service.
14. Praecipe for transcript.

H. M. STEPHENS,

Attorney for Defendant (and plaintiff in error).

Indorsed: Praecipe for Transcript. Filed U. S. Circuit Court, Western District of Washington, July 22, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

<p>GREAT NORTHERN RAILWAY COMPANY, a corporation, <i>Plaintiff and Defendant in Error,</i> vs. THE FIDELITY LUMBER COM- PANY, a corporation, <i>Defendant and Plaintiff in Error.</i></p>	}	No. 1948.
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CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Sam'l D. Bridges, Clerk of the Circuit Court of the United States, for the Western District of Washington, do hereby certify the foregoing 77 printed pages, numbered 1 to 77, inclusive, to be a full, true and correct copy of so much of the record and proceedings in the above and foregoing entitled cause, as is called for by praecipe of Attorney for Defendant and Plaintiff in Error, as the same remain of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that I annex hereto and herewith transmit the Original Writ of Error and Citation.

I further certify that the cost of preparing and certifying the foregoing return to Writ of Error is the sum of \$94.50, and that the said sum has been paid to me by H. M. Stephens, Esq., Attorney for Defendant and Plaintiff in Error.

In testimony whereof, I hereunto set by hand and affixed the seal of said Circuit Court, at Seattle, in said District, this 15th day of August, A. D. 1911.

{Seal)

SAM'L D. BRIDGES, Clerk.
By B. O. WRIGHT,
Deputy Clerk.

No. 2021

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT.

THE FIDELITY LUMBER COMPANY,
Plaintiff in Error,

v.

GREAT NORTHERN RAILWAY COMPANY,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Writ of Error from United States Circuit Court, Western
District, of Washington, holding Terms
at Seattle.

H. M. STEPHENS,
Attorney for Plaintiff in Error.
Spokane, Wash.

No.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE FIDELITY LUMBER COMPANY,
Plaintiff in Error,

v.

GREAT NORTHERN RAILWAY COMPANY,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

**Writ of Error from United States Circuit Court, Western
District, of Washington, holding Terms
at Seattle.**

STATEMENT OF CASE.

(The figures in parentheses in this brief refer to folios of the Record.)

The facts in this case are shown by the admissions in the pleadings and the Statement of Facts in the case. Paragraphs I, II, III, and IV of the Complaint are admitted by the Answer. They are as follows:

I.

That the Great Northern Railway Company is and at all times hereinafter mentioned was a corporation

duly organized and existing under and by virtue of the laws of the State of Minnesota.

II.

That the defendant, the Fidelity Lumber Company, is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

III.

That the Great Northern Railway Company is now and at all the times hereinafter mentioned was a common carrier of freight and passengers from points within to points without the State of Washington, and from points within to points without the State of Idaho, and as such carrier is and at all times was subject to and amenable to the provisions of that certain act of Congress, entitled "An Act to Regulate Commerce," approved February 4th, 1887, and the acts of Congress amendatory thereof and supplemental thereto.

IV.

That heretofore and prior to October 31st, 1907, plaintiff, together with other carriers amenable to said Act to Regulate Commerce, and in pursuance of the provisions of said Act, filed and published certain tariffs prescribing rates for the transportation of lumber, shingles and other forest products from points within to points without the States of Washington and Idaho, which were substantially higher than the rates theretofore in force between said points, and in force up to and including October 31st, 1907. That heretofore, to-wit, on or about

October 31, 1907, the Honorable C. H. Hanford, one of the judges of the above Court, signed and entered an order by the terms whereof this plaintiff was enjoined from collecting or receiving from the Pacific Coast Coast Lumber Manufacturers' Association, or from the Shingle Mills Bureau, or from any persons, firms or corporations who were members of the said Pacific Coast Lumber Manufacturers' Association or of the Shingle Mills Bureau, or from the consignees of said Association or Bureau or the members thereof, amounts for the shipment of lumber, shingles or other forest products described in its certain tariffs to which this plaintiff was a party, and filed with the Interstate Commerce Commission, and known as I. C. C. Tariff Number 850, and Great Northern I. C. C. No. A2667, and Northern Pacific I. C. C. Tariff No. A3432, in excess of the rates shown in the schedules of said tariffs on file with the Interstate Commerce Commission and in force up to and including October 31, 1907. That said order so signed and entered by the said Honorable C. H. Hanford, was signed and entered upon a certain bill of complaint filed in said Court wherein the said Pacific Coast Lumber Manufacturers' Association, and others, were complainants, and the Great Northern Railway Company, and others, were defendants, which said bill and the cause in which the same was filed, was known and designated in said Court as Case No. 1565.

Paragraph V of the Answer is as follows:

V.

Admits that the Potlatch Lumber Company, the Fidelity Lumber Company, and others, filed their complaint in intervention in said action No. 1565, mentioned

in paragraph numbered "IV" of the Complaint of plaintiff herein, by leave of Court, and therein and thereby prayed that they have the benefit of the original order in said action and of the intervention order therein, and that the defendants in said action be enjoined and restrained from collecting freight rates on lumber and forest products in excess of the rates in existence October 31, 1907, from point of shipment to destination, and admits that a restraining order or injunction was issued on the 18th day of November, 1907, enjoining and restraining the defendants in said action as aforesaid, and permitting thereby the intervenors to have the benefit of the order of Court theretofore and then entered, upon compliance with the order of Court with reference to giving of bond; and admits that the order was as set forth in paragraph numbered "V" of the Complaint of plaintiff herein; and defendant denies each and every other allegation, matter and thing contained in paragraph numbered "V" of the Complaint of plaintiff herein.

Paragraph VI of the Complaint is as follows:

VI.

That thereafter the defendant Fidelity Lumber Company agreed to and with the Great Northern Railway Company that in accordance with the terms of said order of November 18, 1907, it would pay to the Great Northern Railway Company, for and on account of the shipment and transportation of lumber, shingles and forest products under said order, from points within to points without the States of Washington and Idaho, the difference, if any, between the amount paid for such service at the rate provided by said order of November 18, 1907, and

whatever rate should be finally established as the rate lawfully chargeable therefor on and after November 1, 1907.

Paragraph VI of the Answer is as follows:

VI.

The defendant admits the allegations of paragraph numbered "VI" of the Complaint, but in this connection the defendant alleges that the Interstate Commerce Commission cannot legally establish a rate which is not subject to review by the Courts, and that the meaning of the order and the obligation upon defendant in making shipments was to pay such lawful rate as may be finally determined and established by the Courts.

Paragraphs VII and VIII of the Answer are as follows:

VII.

Defendant admits that in pursuance of said order of November 18, 1907, and the original order entered in said action, the plaintiff received from defendant and caused to be transported from points in Washington and Idaho to points in other states, lumber and forest products as set forth in paragraph "VII" of the Complaint. And defendant denies each and every other allegation, matter and thing contained in paragraph numbered "VII" of the Complaint of plaintiff herein.

VIII.

Defendant admits that on or about June 2, 1908, the Interstate Commerce Commission, upon the complaint of the Potlatch Lumber Company, defendant, and others,

in pursuance of law, fixed and determined the rates legally chargeable for the transportation of lumber, shingles and other forest products between Washington and Idaho points and points in other states from which and to which said products were transported by plaintiff for the defendant; and defendant denies each and every other allegation, matter and thing contained in paragraph numbered "VIII" of the Complaint of plaintiff herein.

Defendant alleges that under and by reason of the law the plaintiff is not entitled to the sum or amount set forth and mentioned in paragraph "VIII" of the Complaint of plaintiff herein.

That plaintiff herein and intervenors in said original action do not agree as to what amount the shippers and intervenors should pay the plaintiff herein upon shipments made by said shippers and intervenors. That the shippers and intervenors contend that no greater rate can be charged than that fixed by the Commission from point of shipment to point of destination, and plaintiff herein contends that it is entitled to collect from said shippers and intervenors the Pacific Coast rate for shipments made from points in Eastern Washington and Northern Idaho to points east of the Pembina line, between November 1, 1907, and the date when the Interstate Commerce Commission fixed and determined the rates to be charged by the plaintiff and other carriers. That the claim made by the plaintiff is based purely and simply upon the Pacific Coast rate and not the rates in effect October 31, 1907, nor which were designated in the tariff which it is claimed became effective November 1, 1907, nor the amount fixed by the Inter-

state Commerce Commission as the rates from Eastern Washington and Northern Idaho to points of destination.

The other allegations in the complaint are denied.

The facts in addition to the admissions of the answer are shown in the record at pp. 13 to 56, 62-3.

Defendant is a common carrier of interstate traffic, and for a long time had a tariff upon forest products covering interstate shipments, which tariff remained in effect to and including October 31, 1907. Defendant in error filed a tariff with the Interstate Commerce Commission effective November 1, 1907. Before the new tariff went into effect an injunctive action was commenced in the Circuit Court of the United States at Seattle, Washington, wherein and whereby the carriers were enjoined and restrained from collecting more than the rate in effect October 31, 1907. That action was appealed to this Court and the lower Court affirmed. Shippers who were not original parties to that injunction suit were permitted to intervene. Plaintiff in error intervened and secured the benefit of an injunction granted therein, and made shipments in accordance with the order of the Court and paid the rate in effect in October, 1907. An action was commenced before the Interstate Commerce Commission affecting rates upon forest products from the Spokane District (in which district plaintiff in error does business). The Commission, for the most part, condemned the raise in rates, but did make some increase east of what is known as the Pembina line, the increase from the Spokane District being two cents per hundred pounds.

In the original decision in the Spokane case (which is herein synonymous with Potlatch Lbr. Co. case), to which the defendant in error was a party, the Commis-

sion stated that no reparation was asked. There was a prayer for general relief, and immediately upon receipt of the decision counsel for the complainants wrote the Commission that reparation was desired (pp. 15, 27-32), and later an order was made that reparation should be made as to all shippers and by all carriers and accounts rendered and filed in the Pacific Coast cases (25-7). Later the carriers contended that that order only permitted reparation to be made upon the basis of Pacific Coast rates, and the Commission so ordered (33-5) without any finding of fact other than originally made in the original decision in which certain rates were held to be reasonable and certain lower rates held to be reasonable for the Spokane District, the Commission also holding that the Spokane District was entitled to lessor rates because of shorter distance and shorter haul and the basis of reparation by the Commission was arbitrarily made without reference to the old rate, that is, the rate in effect on October 31, 1907, or the rates fixed by the Commission from the Spokane District. The basis of reparation for the Spokane District shippers is not any rate that was ever in force or effect from the Spokane District or fixed by the carriers or by the Commission. The complainants filed petition for rehearing and made application to file supplemental petition and to amend their original petition asking for reparation (15, 16-25, 36-46, 49-54). All these were denied, but reparation was ordered and the basis thereof arbitrarily fixed on the Coast rates (27, 35).

The shipments involved in this action were made by the plaintiff in error from its place of business in Washington and Idaho to points east of what is designated in the Commission decision as the Pembina line. The rate

from points of shipment to point of destination in effect October 31, 1907, was 40 cents per hundred pounds. The rates fixed by the advance or new tariff of defendant in error effective November 1, 1907 (except for the injunction), was 45 cents per hundred pounds and the rate fixed by the Interstate Commerce Commission was and is 42 cents per hundred pounds. This action is for the difference between the rate in effect October 31, 1907, and the Pacific Coast rate fixed by the Interstate Commerce Commission, *viz.*, 45 cents per hundred pounds, that is, a difference of 5 cents per hundred pounds. The plaintiff in error insisted below and insists now that the judgment should be for only two-fifths of the amount sued for instead of the whole of the sum sued for. The amount sued for is \$2805.65, for which judgment was rendered.

The rates in effect October 31, 1907, was 40 cents from Spokane, and beginning about eighteen miles east of Spokane the rates were less than they were from Spokane, the difference was two and three cents. At Sandpoint, about one hundred miles east of Spokane, the rate was still less and a greater differential existed between the Sandpoint and the Spokane rate. In one of the Pacific Coast cases (14 I. C. C. 19) the Commission held that the rates in effect prior to November 1, 1907, to all points on and west of the "Pembina" line "were and are just and reasonable and should be restored," and further held in that case that rates from the Pacific Coast to points east of the "Pembina" line "might reasonably be somewhat increased. Such increase should not, however, in any case exceed the rates in effect immediately prior to November 1, 1907, by more than 5 cents per 100 pounds." (p. 19.)

As to reparation, the Commission said (14 I. C. C., p. 20):

“While permitting some rates to be increased this adjustment also reduces some rates below what they were immediately prior to the increase complained of. We think that complainants are entitled to reparation only upon shipments upon which charges were collected in excess of the rates between the same points which were in effect immediately prior to November 1, 1907; that in instances in which the rates herein prescribed are not lower than the rates which were in effect between the same points immediately prior to November 1, 1907, such reparation should be measured by the difference between the rates actually paid and those herein prescribed; and that in instances in which the rates herein prescribed are lower than the rates which were in effect between the same points immediately prior to November 1, 1907, such reparation should be measured by the difference between the rates actually paid and those which were in effect between the same points immediately prior to November 1, 1907.”

In another of the Pacific Coast cases the Commission held (14 I. C. C. 39):

“It seems clear from all the facts appearing that the rates in effect prior to the advances made in November, 1907, to points of destination, generally, west of the Missouri River were fairly remunerative. To certain points farther east, involving longer hauls, it is believed that there was justification for some advance in view of the less revenue per ton per mile accruing to the carriers from this traffic.”

The Commission further held that the rates involved in and upon the hearing applying from points on and

west of the "Pembina" line "are unreasonable and unjust to the extent that they exceed those that were in effect over the lines of the defendant carriers, respectively, on October 31, 1907, between the respective points of origin and destination shown in the rate schedules hereinbefore specified. It is also the opinion of the Commission that the rates now in effect from said points of origin to points in territory" east of the "Pembina" line "are unreasonable and unjust to the extent that they exceed 5 cents per 100 pounds above the rate in effect October 31, 1907." (14 I. C. C. 40.)

As to reparation, the same rule was made as in the other case quoted from, *viz.*:

"While permitting some rates to be increased this adjustment also reduces some rates below what they were immediately prior to the increase complained of. We think that complainants are entitled to reparation only on account of shipments upon which charges were collected in excess of the rates between the same points which were in effect on October 31, 1907; that in instances in which the rates herein prescribed are not lower than the rates which were in effect between the same points on October 31, 1907, such reparation should be measured by the difference between the rates actually paid and those herein prescribed; and that in instances in which the rates herein prescribed are lower than the rates which were in effect between the same points on October 31, 1907, such reparation should be measured by the difference between the rates actually paid and those which were in effect between the same points on October 31, 1907. (14 I. C. C. 40.)

In the Spokane case, the Commission goes extensively into the various districts and shows some of the differ-

ence in rates between Spokane and points east of Spokane and the Coast, prior to November 1, 1907. (14 I. C. C. 42-5.)

In the Potlatch (Spokane) case, the Commission used the following language:

“From the above it will be seen that the defendant carriers have by their own voluntary actions admitted the propriety, not only of a group or blanket, for the purpose of rate making from the Spokane-Sandpoint District, but also that some differential under the Coast should be allowed to that group. * * * Their claims in this regard are based upon (a) the distance, (b) the mountain grades to the summit of the Cascades, and (c) the wide treeless farming section, all to be traversed from the Coast before the timber of the Spokane District is reached. * * *

“Two facts stand out as beacon lights in the sea of testimony produced in this case: * * *; the other is that the carriers by the tariffs complained of, as well as in part by the old tariffs, have admitted in part the propriety of a differential in favor of the Spokane District, as grouped in the new tariffs and in part in the old, as against the Coast.

“A careful examination of the testimony as a whole makes it plain that a differential in favor of Spokane and the Spokane District under the rates from the Coast should exist, but there is great difficulty in determining just what the amount of that differential should be, and from what shipping and to what destination points it should apply. The same is true of the district bordering the eastern slope of the Cascade Range. If, however, the tables hereinbefore set out are referred to, it will be apparent that even under the old tariffs differentials

under the Coast were allowed from some shipping points in the present Spokane-Sandpoint District to certain destination points, the grading being from nothing in Minnesota to 6 cents on the line of the Northern Pacific between Mandan and Sully Springs, inclusive, in North Dakota; and along the line of the Great Northern from nothing in Minnesota to from 1 cent at Petersburg to 7 cents at Buford, N. Dak. To the old Spokane District proper no differential under the Coast was allowed. Under the new tariffs, along the lines of the Great Northern and Northern Pacific the differentials from the present Spokane-Sandpoint District under Coast rates are 5 cents in Minnesota, and from 5 cents to 8½ cents in North Dakota. By these same new tariffs the rates from the Montana-Oregon group to various common destination points are from nothing to 5 cents under the Spokane rates, the basing of the Montana-Oregon group being, however, directly under the Coast rates and not under the Spokane rates. The rates from the eastern slope of the Cascade Range are 2½ cents higher than the Spokane rates in all cases, this differential being apparently an intermediate or half step between the Coast and the Spokane rates. These facts, though not conclusive of the grouping that should be made under a practical restoration of the tariffs in effect prior to November 1, 1907, are strongly persuasive that some changes in the former groupings should be made.

* * * “For the purposes of this case it is sufficient that the defendant carriers by their own acts in establishing the various tariffs, old and new, have made admissions, in the nature of estoppels *in pais*, that parts of the Spokane District, as grouped since November 1, 1907, should have a differential under the rates from the Coast,

and that an intermediate differential should apply to the eastern slope of the Cascade Range—the two districts being separated by a natural barrier of farming country.

* * * "In view of the physical facts, emphasized in the record of this case, that Spokane is separated from the Pacific Coast by a rail distance little short of 400 miles by the routes actually used; that in most of these routes the haul from the Coast necessarily crosses the Cascade Range; that for something like 200 miles east of the Cascades the country is a treeless farming region until the immediate vicinity of Spokane is reached, the Commission's conclusions are that the rates on interstate shipments of lumber, shingles, and other forest products from the groups hereafter named to points on and west of a line drawn from Pembina, N. Dak., southward through Grand Forks, N. Dak., Moorhead and Breckenridge, Minn., Sioux City and Council Bluffs, Iowa, St. Joseph and Kansas City, Mo., and thence to Port Arthur, Texas, along the Kansas City Southern Railway, including all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the rates on similar shipments from the "Coast Rates" group as follows:

"Rates from the group points east of the summit of the Cascade Mountains, and west of the present "Spokane Rates" group, to points on and west of said line from Pembina, N. Dak., to Port Arthur, Tex., including all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the rates prescribed by the Commission in Cases Nos. 1327, 1329, and 1335 from the "Coast Rates" group by differentials

beginning at not less than 2 cents per 100 pounds and graded up westwardly therefrom (a) to a differential of not less than 6 cents per 100 pounds at Buford, N. Dak., on the line of the Great Northern Railway; (b) to a differential of not less than 6 cents per 100 pounds at Medora, N. Dak., on the line of the Northern Pacific Railway; (c) to a differential of not less than 6 cents per 100 pounds at Edgemont, S. Dak., on the line of the Chicago, Burlington & Quincy Railroad; (d) to a differential of not less than 6 cents per 100 pounds at Cheyenne, Wyo., on the line of the Union Pacific Railroad; (e) and to a differential of not less than 6 cents per 100 pounds at Denver, Colo., on the line of the Union Pacific Railroad.

“Rates from the present “Spokane Rates” group and from the present “Montana-Oregon Rates” group to points on and west of said line including all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the “Coast Rates” as prescribed in the cases specified, by differentials beginning at not less than 3 cents per 100 pounds and graded up westwardly therefrom to a differential of not less than 7 cents per 100 pounds at Buford, N. Dak., Medora, N. Dak., Edgemont, S. Dak., Cheyenne, Wyo., and Denver, Colo., as described in the preceding paragraph.

“Rates from the group of points east of the summit of the Cascade Mountains, and west of the present “Spokane Rates” groups, to points east of said line, Pembina-Port Arthur, and excluding all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the “Coast Rates,” as pre-

scribed in the cases specified, by a differential of not less than 2 cents per 100 pounds, up to and including Duluth, Minneapolis, St. Paul and Minnesota Transfer, and from the Missouri River crossings to the Mississippi River crossings." (14 I. C. C. 46-9.)

ASSIGNMENT OF ERRORS.

The Assignment of Errors of plaintiff in error made and filed with defendant's application for writ of error herein, omitting formal parts, is as follows:

I.

That the United States Circuit Court, in and for the Western District of Washington, holding terms at Seattle, erred in rendering judgment for the plaintiff Great Northern Railway Company.

II.

The said Court erred in rendering judgment for any amount in excess of two-fifths of the amount sued for.

III.

The said Court erred in its Conclusions of Law, to the effect, and holding, that plaintiff is entitled to judgment herein.

IV.

The said Court erred in not holding and determining that plaintiff was entitled to recover not to exceed two-fifths of the amount sued for.

V.

The said Court erred in holding that plaintiff was entitled to judgment for anything in excess of the rates fixed by the Interstate Commerce Commission, to-wit, 42 cents per 100 pounds, from point of shipment in this action to points of destination.

VI.

The Court erred in not determining that it would be depriving the defendant of its property without due process of law, to require it to pay an unjust and unreasonable rate, or any rate in excess of that fixed by the Interstate Commerce Commission as to future rates.

VII.

The said Court erred in holding that for reparation purposes the Interstate Commerce Commission fixed the Pacific Coast rate to points of destination of shipments involved in this action, which Pacific Coast rate is fixed for a distance of more than four hundred miles more haul, as compared with the haul from the point of shipment to points of destination involved in this action.

VIII.

The said Court erred in not holding that it was beyond the power of the Interstate Commerce Commission not to allow reparation on the basis fixed as reasonable rates by the Interstate Commerce Commission.

IX.

Said Court erred in not holding that reparation must

be upon the basis of a reasonable rate, and erred in not holding that the reasonable rate for reparation must either have been the rate in effect October 31, 1907 (prior to the effective date of the proposed advanced rates which were condemned by the Commission), or the rate fixed by the Interstate Commerce Commission.

X.

The said Court erred in reaching the conclusion of law and rendering judgment for the plaintiff herein, because the judgment and the result thereof is the taking of the property of the defendant without due process of law, and the effect of the judgment rendered by the Court is that defendant is required thereby (if the same be not reversed) to pay an illegal, unreasonable, unjust and unlawful freight rate upon the shipments involved in this action.

POINTS, AUTHORITIES AND ARGUMENT.

Plaintiff in error will discuss all the errors assigned together because they weave into each other in such manner that it will be easier and will require much less time and space to consider them together.

Plaintiff in error with other shipper pursued the course which is required under the case of Texas & Pacific Railway Company vs. Abilene Cotton Oil Company, 214 U. S. 426, 27 S. C. R. 350, in which it was held that before an action can be maintained in Court for reparation it is necessary to go before the Commission and have an order fixing rates. It is nowhere intimated in that case that if the Commission fails to order reparation such as the law contemplates that a shipper is with-

out relief. To enforce that rule would deny the shipper the equal protection of the law and take his property without due process of law, and be in violation of the Commerce Act.

The shipper has the same right under the Constitution to present to the Court the question of taking property without due process of law, and the matter of equal protection of the law to the same extent and in the same way as carriers have those rights. Any other construction of the statute would render it unconstitutional and void.

It has recently been held by the Circuit Court of Appeals of the Eighth Circuit in *Denver & R. G. R. Co. vs. Baer Bros. Mer. Co.*, 187 Fed. 485, that the Interstate Commerce Commission has no power to order reparation without fixing a reasonable rate for the future. It follows that the future rate is, for the purpose of reparation, a reasonable rate fixed by the Commission.

The Commission allowed Coast shippers reparation based on future Coast rates from points of shipments to points of destination, from Coast points to where shipments involved in this action were carried and transported by the defendant in error.

Express findings are made as to reasonable rates from Pacific Coast points for the past as well as the future, and express finding is made in the Potlatch Company case that shippers from the Spokane District are entitled to lesser rates than Pacific Coast shippers are entitled to, and no other or different finding of fact was ever made by the Commission, but the Commission arbitrarily, without any finding of fact refused to allow reparation in accordance with their finding as to what

are reasonable rates from the Spokane District. There isn't any evidence in the case or any finding of the Commission that warrants the assertion that the Commission found the Pacific Coast rates to be reasonable for the purpose of reparation or the period of time between October 31, 1907, and the date when the order became effective as to future rates. No testimony was taken after the original decisions were rendered, no rehearings or amendments or supplemental pleadings were allowed and the facts were found and based upon evidence introduced and admitted before any of the decisions were rendered. Hence, there isn't any evidence or facts found or determined by the Commission that warrant the arbitrary, unjust and unreasonable conclusion that the shippers of the Spokane District must for a specific period of time pay the Pacific Coast rate when that was neither the old rate nor the advanced railroad rate nor the rate fixed by the Commission.

If the conclusions of the Commission are not supported by proper findings, their order is a nullity.

Southern Pacific Company et al. vs. I. C. C., 219
U. S. 433, 31 S. C. R. 288.

It has been decided by the United States Commerce Court in Decision No. 5—July 20, 1911—*Hooker et al. vs. I. C. C.*, that a shipper can invoke the constitutional provisions and the aid of a Court of equity in the same manner and to the same extent that the carriers may (p. 6).

The same Court reached the same conclusion in its Decision No. 9 (pp. 3-7).

The same conclusion was reached in the case of Peavy

& Co. vs. Union Pacific Co., 176 Fed. 409, by three Circuit Judges.

It has been settled law ever since the case of Smythe vs. Ames, 169 U. S. 466, 18 S. C. R. 418, that carriers have the constitutional right to have rate legislation and orders reviewed by the Courts.

The carriers are constantly appealing to the Courts for injunctive and other relief against orders of the Interstate Commerce Commission.

Southern Pac. T. Co. vs. I. C. C., 219 U. S. 433,
31 S. C. R. 288.

I. C. C. vs. N. P. Ry. Co., 216 U. S. 538, 30 S. C.
R. 417.

I. C. C. vs. Delaware L. & W. R. Co., 220 U. S.
235, 31 S. C. R. 392.

We are not unmindful of the fact that under the amended Commerce Act, pure and simple findings of fact of the Commission are presumptively correct, and possibly the rule goes further and makes pure and simple findings of fact conclusive.

Ill. Central R. R. Co. vs. I. C. C., 215 U. S. 452,
30 S. C. R. 155.

I. C. C. vs. Delaware L. & W. R. Co., 220 U. S. 235,
31 S. C. R. 397.

I. C. C. vs. Chicago etc. Co., 218 U. S. 88, 30 S. C.
R. 651, 659.

These cases, while extending the rule as to findings of fact beyond what the rule formerly was, recognize that the Courts have a right of review upon all law and constitutional questions.

The holdings of these cases are that the Courts can not review administrative matters or pure and simple findings of fact, but can review all questions arising under the constitution or laws of the United States or the Commerce Act itself. The holding in *So. Pac. v. I. C. C.*, 219 U. S. 433, is that the Commission must find sufficient facts to warrant the conclusion or order made, or they will be set aside.

If the result of the order of the Commission is to create a discrimination which is prohibited by the Act the order is beyond the power of the Commission and cannot be enforced either by the Commission or the Court, and when an action such as the one at bar is founded upon the order of the Commission which is in conflict with the terms of the act, and there are no findings of fact upon which the order can be sustained, no liability can be enforced and no judgment rendered. The cases herinbefore cited seem conclusive upon these questions.

The judgment of the lower Court in this case results in a necessary violation of the Commerce Act because it creates an absolute and perfect discrimination and is in direct conflict with the findings of the Commission set forth in the "Statement of the Case" herein. The Commission expressly finds and determines that a lower rate should exist from the Spokane District than from the Coast District, and expressly determines that a lower rate than the Coast rate is a reasonable rate from the Spokane District. These findings of fact, if they be deemed *prima facie* correct or conclusively correct necessarily prevent the Commission from making an order in direct conflict with such findings.

To enforce the judgment in this action, in addition to

the discrimination that would necessarily result, requires the further violation of the statute, in that it would require the plaintiff in error to pay an unreasonable rate and one which has not been found to be reasonable by the Commission and no facts are found upon which a conclusion can be drawn that it was a reasonable rate at the time the shipments were made.

To sustain the judgment herein would deprive the plaintiff in error of its property without due process of law just as much and to the same extent as an unreasonably low rate would deprive a carrier of its property without due process of law. It is just as much a violation of the due process of law provision of the Federal Constitution to require a shipper to pay an unreasonable, unjust and exorbitant rate as it is to require a carrier to carry shipments at an unreasonably low rate, and the right to raise and adjudicate these questions exists in the shipper the same as in the carrier, or the Federal Constitution as to the equal protection of the laws will be violated.

Section 1 of the Commerce Act provides that all charges for any service rendered "shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 2 provides against discrimination which is prohibited and declared to be unlawful, and Section 3 makes provision against unlawful preference or advantage to any person, which unreasonable preference or advantage are declared unlawful.

Under the findings of fact, by the Commission, to fix or charge the Coast or same rate from Spokane District to points between the "Pembina" line and Minneapolis

transfer points (Minneapolis-St. Paul) would necessarily be an unjust rate from the Spokane District and necessarily a discrimination and unreasonable preference and advantage and prohibited by the Commerce Act.

The judgment in this case should not have exceeded the rate fixed by the Commission from points of shipment to points of destination. That was the rule fixed for reparation from the Coast District, and to apply any other rule to the Spokane District would clearly be an unjust and unlawful preference and discrimination.

The reparation order from the Coast shipping points was the difference between the rate in effect October 31, 1907, and the rate actually paid, in all instances where the rates were not raised by the Commission. When the rates were raised, then the reparation order was the difference between the rate fixed by the Commission and the rate paid.

Applying this same order to the shippers of the Spokane district, and especially to the plaintiff in error in this case the defendant in error would be entitled to recover of plaintiff the difference between the old rate in effect October 31, 1907, and the rate fixed by the Commission, that is, the Commission raised the rate on shipments involved in this action 2 cents above what they were October 31, 1907. The points of shipment were east of Spokane and the shipments moved to points east of the "Pembina" line and between there and the "transfer points." The suit is for 5 cents above the October, 1907, rate.

Surely there are no facts in this case nor in theory to warrant a judgment against the plaintiff in error for the Pacific Coast rate for shipments which in fact did

not move over the distance between the Coast points and points of shipment by the plaintiff in error, a distance of some 400 miles. The Commission has no power or authority to arbitrarily order for the purpose of reparation that the plaintiff in error should be required to pay 3 cents more than the Commission fixed as a reasonable rate, from point of shipment to point of destination.

The only authority that the Commission had was to award damages in accordance with, not in conflict with, its findings of fact and conclusions in the Potlatch Company (Spokane) case, which case affected and fixed rates from the Spokane District.

The only authority the Commission had was under Section 16 to make an order of and for reparation in accordance with what the carrier was entitled to or the shipper should pay under the findings of fact of the Commission, and this should be measured by the rates from points of shipment to points of destination, not from Pacific Coast points to destination of the shipments involved in this action.

The plaintiff in error paid the old rate, that is, the rate in effect October 31, 1907, and was protected under the injunction from paying any other or different sum until the rates were fixed by the Interstate Commerce Commission, and this is not a suit by the plaintiff in error to recover back money paid, but is a suit by the defendant in error to require the plaintiff in error to pay 5 cents a hundred more than the rate in effect October 31, 1907, when the Commission in fact fixed the rate only 2 cents in excess of the rate in effect October 31, 1907.

The judgment of the lower Court should be reversed with costs and direction to enter a judgment for two-fifths of the amount sued for.

Respectfully submitted,

H. M. STEPHENS,
Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY,
a corporation,
Plaintiff and Defendant in Error,
v.

THE FIDELITY LUMBER COMPANY,
a corporation,
Defendant and Plaintiff in Error.

Brief of Defendant in Error.

Writ of Error from United States Circuit Court, West-
ern District of Washington, holding Terms
at Seattle.

F. V. BROWN,
F. G. DORETY,
JAMES B. KERR,
Attorneys for Defendant in Error.

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STATEMENT.

This action was brought in the circuit court of the United States for the western district of Washington by the Great Northern Railway Company against the Fidelity Lumber Company to recover the sum of \$2805.65. The jurisdiction of the circuit court rested on diversity of citizenship in that the plaintiff is a Minnesota corporation and the defendant is a Washington corporation. The action was tried before the court,

Judge Hanford presiding, without a jury, upon the pleadings and an agreed statement of facts, and resulted in a judgment in favor of the plaintiff for the full amount demanded.

The conceded facts as shown by the admitted allegations of the complaint and by the agreed statement are as follows:

The plaintiff was a common carrier of freight from points within the states of Washington and Idaho to ~~1907~~ ^{and}, had, with other carriers, filed and published, under the provisions of the act to regulate commerce, certain tariffs prescribing rates for the transportation of lumber, shingles and other forest products from points in Washington and Idaho to points in other states. Prior to October 31, 1907, the plaintiff and such other carriers filed and published other tariffs which by their terms became effective November 1, 1907, prescribing rates substantially higher than those theretofore in force.

On or about October 31, 1907, by an order of the circuit court for the western district of Washington, the plaintiff and such other carriers were temporarily enjoined from collecting from the Pacific Coast Lumber Manufacturers' Association, the Shingle Mills Bureau, or any of their members or their consignees, rates for the transportation of such commodities higher than the rates which were in effect on October 31, 1907. As a condition of the relief granted by this order the court required those seeking to enjoy its benefits to execute a bond to the carriers to pay the difference be-

tween the old rates and such new rates as should be held reasonable by the Interstate Commerce Commission or by the circuit court. Thereafter the Potlatch Lumber Company and others, including the Fidelity Lumber Company, the defendant in this action, intervened in the suit in which the injunction was granted and the benefits of such injunction were extended to the intervenors upon their giving like security as that before required.

The obligation which the Fidelity Lumber Company assumed in this respect most clearly appears from the pleadings. Paragraph VI of the complaint is as follows (Transcript, page 6) :

“That thereafter the defendant, Fidelity Lumber Company, agreed to and with the Great Northern Railway Company that in accordance with the terms of said order of November 18, 1907, it would pay to the Great Northern Railway Company for and on account of the shipment and transportation of lumber, shingles and forest products under said order from points within to points without the states of Washington and Idaho the difference, if any, between the amount paid for such service at the rate provided by said order of November 18, 1907, and whatever rate should be finally established as the rate lawfully chargeable therefor on and after November 1, 1907.”

This paragraph was admitted by paragraph VI of the answer as follows (Transcript, page 10) :

“This defendant admits the allegations of paragraph numbered VI of the complaint, but in this

connection the defendant alleges that the Interstate Commerce Commission cannot legally establish a rate which is not subject to review by the courts and that the meaning of the order and the obligation upon the defendant in making shipments was to pay such lawful rate as may be finally determined by the courts."

It further appears (Transcript, page 13) that the plaintiff transported for the defendant from points on its line in Washington and Idaho to points in other states, lumber, shingles and forest products, and that the charges thereon were paid according to the tariffs in force on and prior to October 31, 1907.

The agreed statement of facts (Transcript, page 13), contains the following:

"That if payment had been made by the defendant on account of such shipments, according to the rates declared applicable thereto by the Interstate Commerce Commission by its reparation orders and decisions, the plaintiff would have received from said defendant on account of such shipments, in addition to the sum so paid therefor, the amount of \$2805.65."

From the foregoing statement it is apparent that the transportation charges which the circuit court awarded to the plaintiff were those charges which were fixed by the Interstate Commerce Commission, and the only defense offered by the defendant was that a lesser rate should be fixed by the court than that declared by the Commission to be a reasonable rate.

The argument of the defendant involves a consider-

ation of certain decisions of the Commission which are referred to though not set out in the agreed statement of facts. After the tariffs above referred to were filed, which increased the rates from Washington and Idaho points to points in other states, and after the institution of the injunction suit above described, two proceedings were brought before the Interstate Commerce Commission, one by the Pacific Coast Lumber Manufacturers' Association and others, and the other by the Potlatch Lumber Company and others, both against the various carriers engaged in lumber transportation from Washington and Idaho points to the east. The first of these cases is reported in Volume 14, Interstate Commerce Commission Reports, 23, and the second in Volume 14, Interstate Commerce Commission Reports, 41.

In the first of these cases the rates known as the coast rates were challenged. It appeared that prior to November 1, 1907, the rate on fir lumber had been forty cents a hundred pounds from western Washington to Minnesota points with a slightly higher rate on cedar lumber and shingles, and that by the tariffs filed by the carriers the rate on fir lumber had been increased to fifty cents, with a corresponding increase on cedar lumber and shingles. The new tariffs also fixed rates to intermediate points which were higher than those theretofore in force. The Commission held in this case that the increase in rates over those in effect prior to November 1, 1907, to points west of a line drawn from Pembina, North Dakota, to Port Arthur, Texas, was not justified, but sustained one-half of the advance, or five

cents a hundred pounds, on shipments from western Washington to St. Paul, with a graded proportionate increase to all points between St. Paul and the Pembina-Port Arthur line.

The opinion and order in the case last referred to were rendered simultaneously and in connection with the opinion and order in the Potlatch Lumber Company case—Volume 14, Interstate Commerce Commission Reports, 41. In this case the increases in the new tariffs were likewise challenged, but principally on the ground that the shippers of eastern Washington and Idaho were entitled to a differential or a lower rate which would give them an advantage in transportation over the manufacturers of western Washington. By the tariffs of the carriers a differential was allowed on all lumber and forest products from what was denominated the Spokane district comprising points in Washington and Idaho to points in Minnesota of five cents under the coast rate, so that by the tariffs the rate on fir and pine lumber between these points was forty-five cents, with a greater differential to intermediate points. The Commission in considering the claim of the shippers from this district points out that, (a) under the tariffs in force prior to October 31, 1907, a differential was allowed from some points in this district to certain eastern territory, (b) that under the new tariff the carriers had extended this differential to other points, (c) that the western pine produced in this territory was inferior in quality and more expensive of production than the fir of the coast, but (d) that the territory con-

tained large quantities of *white* pine, more valuable than fir. With all these facts before it and considering together the complaints in the two cases specially referred to, and also certain other complaints made by the lumber manufacturers of Oregon and of southwestern Washington, the Commission entered its order and directed an adjustment by the establishment of three zones as the basis for the fixing of rates. These zones or groups of shipping points so made the basis for fixing rates were designated the "Coast Rates" group, the "Spokane Rates" group, and the "Montana-Oregon Rates" group. After defining the limits of these zones the Commission proceeded to fix the rates therefrom to eastern terminals, and designated the date when the rates so prescribed should become effective as October 15, 1908 (Transcript, page 39).

An examination of the opinion of the Commission in the Potlatch case (14 Interstate Commerce Reports, 41), will show that, while in a general way the Commission founded its division of territory and basing points largely upon the tariffs of the carriers which were attacked by the shippers, yet the relations of the rates from these various zones were largely modified.

In the case involving rates from the Pacific Coast, 14 Interstate Commerce Commission Reports, 23, reparation was distinctly asked and the Commission allowed the prayer requiring the carriers to repay to the shippers the difference between the amount paid from November 1, 1907, to October 15, 1908, over and above

the rates declared by the Commission to be effective on the latter date.

In the Potlatch case, however, the Commission distinctly points out that no reparation was prayed and allows none, except on the basis of the coast rates, but merely directs that from and after the date when its order fixing rates shall become effective there shall be established from the Spokane and Montana-Oregon districts rates less than the coast rates by the prescribed differential.

Upon the rendition of this decision by the Commission a petition was filed asking leave to amend and seeking reparation, in other words demanding that the differentials allowed be made retroactive, and to take effect as of November 1, 1907 (Transcript, page 16). This application was denied by order of the Commission, dated January 12, 1909 (Transcript, page 25). The Commission said:

“No reparation was prayed in case 1348 (the Potlatch case). Complaint in said case 1348 did not bring in issue advanced rates of carriers, but it was a prayer for the establishment of new and higher differentials from Spokane territory under the coast rates. It was and is the intention of the Commission that shippers from the Spokane territory shall have reparation under said cases 1327, 1329 and 1335, as well as from any other territory covered thereby, but it was not and is not the intention of the Commission to award additional reparation because of the new differentials fixed in said case 1348.”

Again application was made for a rehearing (Transcript, page 27), and again it was denied in similar unmistakable language (Transcript, page 33).

A careful reading of the opinions and orders of the Commission can leave no doubt that it was its purpose and intent to fix as a reasonable rate a maximum from coast points, effective October 15, 1908, and operative under the reparation order from November 1, 1907, and that it was the intention to give to the Spokane district and the Montana-Oregon district the full benefit of the coast rates so fixed from and after November 1, 1907, by way of reparation and otherwise, and also to adjust trade conditions and require the application of differentials under the coast rates from and after October 15, 1908. The orders of the Commission in so far as they affect rates from the Spokane and Montana-Oregon districts are based largely on the conditions of production in these districts as compared with the conditions of production in the coast territory. An examination of the opinion in the Potlatch case, 14 Interstate Commerce Commission Reports, 41, will further show that the scheme of differentials while adopting the territorial divisions adopted by the carriers, applies a very different scale from that fixed by the carriers. The amounts of the differentials under the coast rates is not the same nor are the differentials fixed by the Commission from various portions of the territory relatively the same.

ARGUMENT.

I.

The rates fixed by the Commission must control.

As has been made to appear by the foregoing statement the parties to this action are agreed that the amount awarded to the plaintiff by the judgment of the circuit court represents the transportation charges due from the defendant under the rates fixed by the Interstate Commerce Commission for the period commencing with November 1, 1907, and ending with October 15, 1908, when the new differentials prescribed by the Commission became effective. It follows, therefore, that when the defendant asks this court to reverse the judgment it thereby insists that this court fix a different rate for this period from that fixed by the Commission. It is settled beyond controversy that the performance of such a function is beyond the power of the courts. This whole question was fully argued before this court on the appeal from Judge Hanford's provisional injunction granted in this same controversy to preserve the *status quo* of the shippers and the carriers pending a determination of the reasonableness of the increased rates by the Commission. The case referred to is reported under the title, *Northern Pacific Railway Company versus Pacific Coast Lumber Manufacturers' Association*, 165 Federal Reporter, 1.

In that case it appeared that Judge Hanford had restrained the carriers from *collecting* the increased rates pending their investigation by the Commission, and on the appeal this court was urged to reverse the

order on the ground that its enforcement amounted to a judicial interference with the exclusive function of the Commission.

This court, however, declined to vacate the injunction, but on the sole ground that the purpose of the order was to preserve the status of the parties until the Commission could act. This court said:

“Upon a careful consideration of the Interstate Commerce act, we find no ground on which to say that it impliedly denies the equitable jurisdiction to enjoin a threatened injury such as is alleged in the bill in the present case. It is true that the courts have no power to pronounce an interstate rate unreasonable or to declare what is a reasonable rate, but this is not to say that a court of equity may not enjoin the enforcement of a threatened ruinous schedule of rates which is proposed to be adopted in the future. * * * * * The case calls for the exercise of a power which is inherent in a court of chancery, the power to enjoin a proposed unlawful act. The exercise of that power does not invade the province of the Interstate Commerce Commission. It prohibits the enforcement of an alleged unreasonable rate only until the Commission shall have had time to adjudge the question of its unreasonableness. To afford such relief is not to fix rates or to change existing rates, or to decide on the reasonableness of established rates, or in any way to interfere with the functions of the Interstate Commerce Commission, nor does it result in the confusion or derangement of rates so forcibly pointed out as the ground of decision in the Abilene Cotton Oil case.”

The demand of the defendant in seeking to have this court set aside the decision of the Commission and fix a new schedule of rates for the period in question manifestly requires the doing of all those things which this court says were not required to be done by the issuance of a temporary injunction and which it rightly declares a court may not do.

See *Texas and Pacific Railroad Company v. Abilene Oil Company*, 204 U. S. 424.

The doctrine of the *Abilene Oil Company Case* is reaffirmed in *Baltimore and Ohio Railroad Company versus United States, ex rel. Pitcairn Coal Company*, 215 United States, 490, 495. In that case the Commission had made an order directing the basis on which coal cars should be distributed by a carrier in times of temporary car shortage. The question was submitted to the court as to the effect of this order, and it was urged that though the order had been made by the Commission in the exercise of its administrative functions, it was competent for the court to enter upon an independent investigation of the propriety and reasonableness of the order. The court said:

“Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the *Abilene* case, that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interstate commerce is assailed in the

courts as unjustly preferential and discriminatory. Upon the facts found, the complaint is declared to be well founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint. The Commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the Commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the Commission were to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body. That these illustrations are not imaginary is established not only by this record, but by the record in the case of the *Illinois C. R. Co. v. Interstate Commerce Commission*."

It seems to be insisted by the defendant that because the Commission fixed a system of differentials in favor of the Spokane district under the coast rates to become effective October 15, 1908, the rates represented by these differentials must be retroactive and take effect November 1, 1907. The authorities just referred to are in themselves a sufficient answer to this suggestion, for whatever may have been the consideration controlling the Commission in this respect it is enough to say that its determination is final and is not subject to re-

view by the courts. However, a reasonable and sufficient basis for the action of the Commission in this regard is manifest and constitutes a complete justification of its order. As has been pointed out the principal ground of complaint upon which the petitioners relied in the Potlatch case consisted in their showing as to the conditions under which their product was manufactured and sold as compared with the similar product of the coast territory. Conditions throughout the Spokane and Montana-Oregon districts were likewise dissimilar and the markets reached by the products of different portions of these two districts were likewise different. Certain of the shippers from this territory had availed themselves of Judge Hanford's injunction, and and were parties neither to the injunction suit nor to the certain shippers had acquiesced in the increased rate proceeding before the Commission.

In some instances the retroactive effect of a differential would enure to the benefit of the manufacturer, and in many instances only to the benefit of the consignee, the purchaser or the consumer. Under the tariffs in effect prior to November 1, 1907, from certain portions of this territory one set of differentials was in effect and under the carriers' tariffs effective November 1, 1907, another set of differentials covering a wider range of territory was prescribed. The Commission determined to establish, largely from commercial considerations, a third set of differentials and concluded, in view of the multitude of complications, that it would result in the greatest good to the greatest number if

this new and comprehensive differential adjustment should not be retroactive.

Even if it was within the province of the court to re-examine this question and review the action of the Commission in this regard it is apparent that such a review could not take place on this record in the absence of the immense volume of testimony which was considered by the Commission. The law has committed to the Commission the final determination of such questions as are here sought to be raised, and wisely so, for the burden of such investigations by the methods found to be necessary for the proper conduct of judicial inquiries would be unbearable.

Again, any reversal of the judgment in this case would necessarily result either in a rank discrimination in favor of this particular shipper as against its competitors or would involve the courts in the duty of reviewing and overthrowing the orders of the Commission in a myriad of cases in some respects similar but differing each from the other in material respects.

It is submitted that the judgment should be affirmed.

F. V. BROWN,

F. G. DORETY,

JAMES B. KERR,

Attorneys for Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE FIDELITY LUMBER COMPANY, a Corporation,
Plaintiff in Error,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Defendant in Error.

PETITION FOR REHEARING.

H. M. STEPHENS,

Attorney for Plaintiff in Error.

Spokane, Washington.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE FIDELITY LUMBER COMPANY, a Corporation,
Plaintiff in Error,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Defendant in Error.

PETITION FOR REHEARING.

Comes now plaintiff in error and petitions this Honorable Court for a rehearing and a reargument of the above entitled case and of the errors heretofore assigned herein for the reason and upon the grounds following, to-wit:

I.

The Court was in error in the statement that in the Potlatch Lumber Company case No. 1348 the complainants made no question as to the reasonableness of rates to Pacific Coast points. The allegations show that complainants in No. 1348 allege that the old 40-cent rate

from Pacific Coast points was all that the carriers were entitled to charge and anything in excess thereof was and is unreasonable.

II.

The Court lays stress upon the statement of the Commission that no prayer for reparation was made in the Potlatch Company case. There was a general prayer, and the practice before the Interstate Commerce Commission is not technical and no prayer is required by the commerce law.

Under technical rules of law, parties to an action or proceeding are entitled to whatever relief the facts show they are entitled to in all cases where the parties have appeared in the action, without reference to the prayer. The prayer does not limit the rights in any manner or respect whatever, so long as the relief granted is consistent.

16 *Ency. Pl. & Pr.*, pp. 776, 780, 781, 794, 795, 796;

Oteri v. Scalzo, 145 U. S. 589;

Tyler v. Savage, 143 U. S. 98;

Jones v. Van Doren, 130 U. S. 692;

Tayloe v. Merchants Fire Ins. Co., 9 How. 406;

Boone v. Chiles, 10 Pet. 228;

Watts v. Waddle, 6 Pet 403;

Dormitzer v. German, etc., Society, 23 Wash. 190, 191;

McKay v. Smith, 27 Wash. 442, 447;
Yarwood v. Johnson, 29 Wash. 643, 649.

III.

This Court states and holds:

“It was finally adjudged that rates from the Spokane Rate Group to points east of the Pembina line should be less than the Coast rates by a differential of not less than 3 cents per 100 pounds.”

This finding and conclusion could only be possible upon the theory that the rates fixed for the future are reasonable.

This Court has seemingly overlooked the fact that from the point of shipment to points of destination involved in this action the differential fixed by the Commission was and is the same as existed before the decision in the Potlatch Lumber case No. 1348.

This Court has not given due consideration to the holdings and findings in the Potlatch Lumber case No. 1348, which are set forth on pages 12 to 16, inclusive, of the brief of plaintiff in error, and for convenience we reproduce the same here.

“From the above it will be seen that the defendant carriers have by their own voluntary actions admitted the propriety, not only of a group or blanket, for the purpose of rate making from the Spokane-Sandpoint District, but also that some differential under the Coast should be allowed to that group. * * * Their claims in this regard

are based upon (a) the distance, (b) the mountain grades to the summit of the Cascades, and (c) the wide treeless farming section, all to be traversed from the Coast before the timber of the Spokane District is reached. * * *

“Two facts stand out as beacon lights in the sea of testimony produced in this case: * * *; the other is that the carriers by the tariffs complained of, as well as in part by the old tariffs, have admitted in part the propriety of a differential in favor of the Spokane District, as grouped in the new tariffs and in part in the old, as against the Coast.

“A careful examination of the testimony as a whole makes it plain that a differential in favor of Spokane and the Spokane District under the rates from the Coast should exist, but there is great difficulty in determining just what the amount of that differential should be, and from what shipping and to what destination points it should apply. The same is true of the district bordering the eastern slope of the Cascade Range. If, however, the tables hereinbefore set out are referred to, it will be apparent that even under the old tariffs differentials under the Coast were allowed from some shipping points in the present Spokane-Sandpoint District to certain destination points, the grading being from nothing in Minnesota to 6 cents on the line of the Northern Pacific between Mandan and Sully Springs, inclusive, in North Dakota; and along the line of the Great Northern from nothing in Minnesota to from

1 cent at Petersburg to 7 cents at Buford, North Dakota. To the old Spokane District proper no differential under the Coast was allowed. Under the new tariffs, along the lines of the Great Northern and Northern Pacific the differentials from the present Spokane-Sandpoint District under the Coast rates are 5 cents in Minnesota, and from 5 cents to 8½ cents in North Dakota. By these same new tariffs the rates from the Montana-Oregon group to various common destination points are from nothing to 5 cents under the Spokane rates, the basing of the Montana-Oregon group being, however, directly under the Coast rates and not under the Spokane rates. The rates from the eastern slope of the Cascade Range are 2½ cents higher than the Spokane rates in all cases, this differential being apparently an intermediate or half step between the Coast and the Spokane rates. These facts, though not conclusive of the grouping that should be made under a practical restoration of the tariffs in effect prior to November 1, 1907, are strongly persuasive that some changes in the former groupings should be made.

* * * “For the purposes of this case it is sufficient that the defendant carriers by their own acts in establishing the various tariffs, old and new, have made admissions, in the nature of estoppels *in pais*, that parts of the Spokane District, as grouped since November 1, 1907, should have a differential under the rates from the Coast, and that an intermediate differential should apply to the

eastern slope of the Cascade Range—the two districts being separated by a natural barrier of farming country.

* * * “In view of the physical facts, emphasized in the record of this case, that Spokane is separated from the Pacific Coast by a rail distance little short of 400 miles by the routes actually used; that in most of these routes the haul from the Coast necessarily crosses the Cascade Range; that for something like 200 miles east of the Cascades the country is a treeless farming region until the immediate vicinity of Spokane is reached, the Commission’s conclusions are that the rates on interstate shipments of lumber, shingles and other forest products from the groups hereafter named to points on and west of a line drawn from Pembina, N. D., southward through Grand Forks, N. D., Moorhead and Breckenrdge, Minn., Sioux City and Council Bluffs, Iowa, St. Joseph and Kansas City, Mo., and thence to Port Arthur, Texas, along the Kansas City Southern Railway, including all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the rates on similar shipments from the “Coast Rates” group as follows:

“Rates from the group points east of the summit of the Cascade Mountains and west of the present “Spokane Rates” group, to points on and west of said line from Pembna, N. D., to Port Arthur, Texas, including all points that now take the same

rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the rates prescribed by the Commission in Cases Nos. 1327, 1329 and 1335 from the "Coast Rates" group by differentials beginning at not less than 2 cents per 100 pounds and graded up westwardly therefrom (a) to a differential of not less than 6 cents per 100 pounds At Buford, N. Dak., on the line of the Great Northern Railway; (b) to a differential of not less than 6 cents per 100 pounds at Medora, N. Dak., on the line of the Northern Pacific Railway; (c) to a differential of not less than 6 cents per 100 pounds at Edgemont, S. Dak., on the line of the Chicago, Burlington & Quincy Railroad; (d) to a differential of not less than 6 cents per 100 pounds at Cheyenne, Wyo., on the line of the Union Pacific Railroad; (e) and to a differential of not less than 6 cents per 100 pounds at Denver, Colo., on the line of the Union Pacific Railroad.

"Rates from the present "Spokane Rates" group and from the present "Montana-Oregon Rates" group to points on and west of said line, including all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the "Coast Rates" as prescribed in the cases specified, by differentials beginning at not less than 3 cents per 100 pounds and graded up westwardly therefrom to a differential of not less than 7 cents per 100 pounds at Buford,

N. Dak., Medora, N. Dak., Edgemont, S. Dak., Cheyenne, Wyo., and Denver, Colo., as described in the preceding paragraph.

“Rates from the group of points east of the summit of the Cascade Mountains, and west of the present “Spokane Rates” groups, to points east of said line, Pembina-Port Arthur, and excluding all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the “Coast Rates,” as prescribed in the cases specified, by a differential of not less than 2 cents per 100 pounds, up to and including Duluth, Minneapolis, St. Paul and Minnesota Transfer, and from the Missouri River crossings to the Mississippi River crossings.” (14 I. C. C. 46-9.)

The rates for the future in the Potlatch Lumber Company case were fixed upon the basis of reasonable rates, and that basis, as shown by the quotation herein made, is equally applicable to past shipments.

Under the findings of fact and the fixing of future rates upon reasonable basis, the Commission could not arbitrarily deny reparation, nor could they deny reparation upon the basis of reasonable rates fixed for the future and which the findings show were reasonable rates as to past shipments.

The only power or authority which the Commission had was to grant reparation in accordance with their opinion and the future rates fixed in the Potlatch Lum-

ber Company case. The contentions of complainant are supported by two recent decisions of the United States Commerce Court.

No. 18, *Russe & Burgess vs. I. C. C.*, filed Feb. 13, 1912;

No. 19, *Thompson Lumber Co. vs. I. C. C.*, filed Feb. 13, 1912.

Under the law the Commerce Court upon interstate commerce questions is theoretically at least superior to other courts and the court most entitled to consideration and most binding as authority, other than the Supreme Court of the United States.

Plaintiff in error insists that the holdings in these cases warrant the granting of a petition for a rehearing herein and a different conclusion from that heretofore rendered and made herein.

Under these cases, the order of the Commission denying reparation on the basis of the rate fixed in case No. 1348 is beyond and in excess of the power of the Commission, and is a mistake of law and not a finding of fact nor an administrative matter.

IV.

These lumber cases have recently been before and determined by the Supreme Court of the United States, and in these cases the Court held, with reference to the powers of the Commission, that they are defined as follows, to-wit:

“It has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determinations of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.”

I. C. C. vs. U. P. R. Co., 32 S. C. R. 111.

The Commission in the Potlatch case undertook to fix reparation on the Pacific Coast basis without any evidence whatever to support it. There was no evidence taken by the Commission after they determined to allow reparation. The principle is the same as if the Commission undertook to fix rates contrary to evidence or without evidence.

The Commission acted beyond its power and jurisdiction.

I. C. C. vs. Peavey, 222 U. S. 42, 32 S. C. R. 22.

V.

The Commission has no power to create a discrimination in reparation. The carriers have no such power. It is beyond the power of either.

There is no escape from the fact that when different rates are fixed from different points that to allow different methods of reparation and to fix reparation on different bases of rates than those fixed for the future is a rank discrimination which is prohibited by law and the decisions of the highest Court in the land.

U. P. R. Co. vs. Updike Grain Co., 222 U. S.
32 S. C. R. 40, 41, 42.

H. M. STEPHENS,

Attorney for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

I, H. M. Stephens, attorney for plaintiff in error in the above entitled action and in the above named Court, do hereby certify that in my judgment the petition for rehearing herein is well founded and that it is not interposed for delay.

Dated Spokane, Washington, this 11th day of March, A. D. 1912.

H. M. STEPHENS.

Use



